JAN 9 1981

MICHAEL RODAK, JR., CLERK

No. 80-231

In The

Supreme Court of the United States

October Term, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,

Appellants,

v.

STATE OF INDIANA, OTIS R. BOWEN, M.D., GOVERNOR, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR APPELLEES

THEODORE L. SENDAK
Attorney General
LINLEY E. PEARSON
Attorney General-Elect
JACK R. O'NEILL
Deputy Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6200
For State of Indiana, Otis R. Bowen, M.D., Governor, Indiana Department of Natural Resources, and Joseph D. Cloud, Director.

HARRY T. ICE
G. DANIEL KELLEY, JR. *
BYRON L. MYERS
STEPHEN M. TERRELL
For Indiana Coal Association, Meadowlark Farms, Inc., AMAX Coal Company, a Division of AMAX Inc., Peabody Coal Company, and John A. Conlon.
OF COUNSEL:
ICE MILLER DONADIO & RYAN
111 Monument Circle
Indianapolis, Indiana 46204
(317) 635-1213

**Counsel of Record*

Central Publishing Co. Inc., Indianapolis IN 46206

No. 80-231

In The

Supreme Court of the United States

October Term, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,

Appellants,

v.

STATE OF INDIANA, OTIS R. BOWEN, M.D., GOVERNOR, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR APPELLEES*

QUESTIONS PRESENTED

Appellees generally agree with the framing of questions 1 and 2 as stated by the Secretary except that appellees believe presenting the Tenth Amendment issue first will facilitate a better understanding of this case. Hence, appellees present the Tenth Amendment issue before the Commerce Clause issue.

* Appellee corporations have filed with the Clerk of the Court a roster of their parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates pursuant to Rule 28.1, as amended.

Questions 1 and 2 concern 21 subsections of Title V of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1251-1279 (Supp. I) ["the Act"], which for ease of reference will be referred to generally as the prime farmland provisions [see Appendix A; pp. 5-7 and note 4 *infra*], the pre-permit approval of changes in land use provisions [see Appendix B; pp. 10-11 *infra*], the areas unsuitable for surface mining provisions [§ 522; pp. 8-10 *infra*], the original contour provision [§ 515(b)(3)] and the topsoil provision [§ 515(b)(5)].

Appellees state the remaining questions presented as follows:

3. Whether the prime farmland and approximate original contour provisions of the Act violate the Due Process Clause of the Fifth Amendment because they discriminate against mine operators and the State of Indiana for no legitimate or rational Federal purpose and because they impose arbitrary, irrational and capricious requirements.

4. Whether the prime farmland provisions, particularly the requirement that certain mined prime farmland be restored to its premining productivity under high levels of management, and the provisions requiring a governmental structure, procedures and criteria for zoning land as unsuitable for surface mining, as well as mandating that certain lands be zoned off-limits to "surface coal mining operations," take private property without just compensation in violation of the Fifth Amendment.

5. Whether § 518(c) of the Act violates the Due Process Clause of the Fifth Amendment by requiring a mining operator to prepay the full amount of a proposed civil penalty into escrow before being entitled to a hearing on the fact of the alleged violation or the amount of the penalty.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
CONSTITUTION AND STATUTES	1
STATEMENT	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. INTRODUCTION: NATURE OF THE CHALLENGED PROVISIONS	4
(A) The Act Operates Directly On The States	5
(B) Land Use Planning And Control Provisions	7
(1) Prime Farmland Provisions	7
(2) Topsoil And AOC Provisions	10
(3) Areas Unsuitable Provisions	13
(4) Pre-Permit Approval Of Land Use And Required Land Use Provisions	14
(5) Miscellaneous	17
II. THE CHALLENGED PROVISIONS ARE CONTRARY TO THE TENTH AMENDMENT	19
(A) Land Use Planning And Control Is An Attribute Of State Sovereignty	22
(B) The Act Coerces The States	29
(C) The State Interests Are Paramount To the Federal Interests	31
III. THE CHALLENGED PROVISIONS EXCEED CONGRESS' POWER UNDER THE COMMERCE AND NECESSARY AND PROPER CLAUSES	34

IV. THE PRIME FARMLAND AND AOC PROVISIONS VIOLATE THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE FIFTH AMENDMENT 47

V. THE CHALLENGED PROVISIONS TAKE PROPERTY WITHOUT JUST COMPENSATION 51

VI. SECTION 518(c) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT 61

CONCLUSION 63

APPENDICES 1a

TABLE OF AUTHORITIES

Cases

Page

Agins v. City of Tiburon, 65 L.Ed.2d 106 (1980) 25, 28, 52

Andrus v. Allard, 444 U.S. 51 (1979) 52, 58

Arnett v. Kennedy, 416 U.S. 134 (1974) 62

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 36

Boddie v. Connecticut, 401 U.S. 371 (1971) 62

California v. United States, 438 U.S. 645 (1978) .. 21, 28

Charles C. Steward Machine Co. v. Davis, 301 U.S. 548 (1936) 31

City of Rome v. United States, 64 L.Ed.2d 119 (1980) . 28

Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942). 36

Construction Industry Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) 25

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)..... 20, 48, 61

Fry v. United States, 421 U.S. 542 (1975). .. 19, 21, 32, 33

Fuentes v. Shevin, 407 U.S. 67 (1972) 62, 63

Goffinet v. Christian County, 65 Ill.2d 40, 357 N.E.2d 442 (1976) 26

Goldberg v. Kelly, 397 U.S. 254 (1970) 62, 63

Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919)..... 23

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 48

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 35, 36, 49

In re Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. May 16, 1980), *appeal pending*, Nos. 80-1810 *et seq.* 8, 55

Kansas v. Colorado, 206 U.S. 46 (1907) 28, 60

Katzenbach v. McClung, 379 U.S. 294 (1964) 35, 36

Kesler v. Department of Public Safety, 369 U.S. 153 (1962) 60

Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 71

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ... 20

Maryland v. Wirtz, 392 U.S. 183 (1968) 21, 35

Matthews v. Eldridge, 424 U.S. 319 (1976) 62, 63

Mabee v. White Plains Pub. Co., 327 U.S. 178 (1945). 48

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). 36

Mugler v. Kansas, 123 U.S. 623 (1887) 61

National League of Cities v. Usery, 426 U.S. 833 (1976). 20-27, 30, 31, 34, 35

NLRB v. Fainblatt, 306 U.S. 601 (1939) 35

North Carolina v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd*, 435 U.S. 962 (1978) 30

Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941) 20

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 26, 28, 29, 52, 57, 60, 61

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 29, 51, 52

Perez v. United States, 402 U.S. 146 (1971) 22, 35

Pyramid Coal Corp. v. Pratt, 229 Ind. 648, 99 N.E.2d 427 (1951) 51

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 52

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 27

Schneider v. Rusk, 377 U.S. 163 (1964) 48

Short v. Texaco, Inc., 406 N.E.2d 625 (Ind. 1980) 51

Sierra Club v. Abston Constr. Co., 620 F.2d 41 (5th Cir. 1980) 18

South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1976) 20

Star Coal Co. v. Andrus, No. 79-171-2 (S.D. Iowa Feb. 13, 1980), *appeal pending*, No. 80-49 57

Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.D.C. 1978), *aff'd*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979) 30

United States v. Butler, 297 U.S. 1 (1936) 60

United States v. California, 297 U.S. 175 (1936) 20

United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) 19

United States v. Darby, 312 U.S. 100 (1941) 23, 34, 36-38

United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979) 18

United States v. Helsley, 615 F.2d 784 (9th Cir. 1979). 20

United States v. Nixon, 418 U.S. 683 (1974) 20

United States v. Testan, 424 U.S. 392 (1976) 61

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 48

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 26

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 25,27

Virginia Surface Mining and Reclamation Ass'n, Inc. v Andrus, 483 F. Supp. 425 (W.D.Va. 1980), *prob. juris. noted*, Nos. 79-1538 and 79-1596 59

Warth v. Seldin, 422 U.S. 490 (1975) 27

Wickard v. Filburn, 317 U.S. 111 (1942) 20, 24, 35

Constitution, Statutes and Regulations

United States Constitution: [JS App. 55a]

Art. I, Section 8 (Commerce Clause) 2, 5, 20-24, 29, 34, 36, 45, 47, 48, 63, 64

Art. I, Section 8 (Necessary and Proper Clause) 35, 36, 45

Fifth Amendment2, 3, 5, 23, 29, 47, 48, 51, 52, 58, 59, 62, 63

Tenth Amendment 2, 5, 30, 31, 64

Indiana Code § 8-20-1-1 *et seq.*..... 14

Indiana Code § 8-20-8-1 *et seq.* 14

Indiana Code § 13-4.1-1-1 (Supp. 1980) [Appendix C hereto]..... 6, 4a

Indiana Code § 13-4-6-1 *et seq.*..... 5a

Indiana Code § 14-4-2-1 *et seq.*..... 5a

Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 30 U.S.C. § 1201 *et seq.* 4-6, 15, 63

"Prime farmland provisions" [Appendix A hereto]*passim*

§ 507(b)(16), 30 U.S.C. § 1257(b)(16) [JA App. 55a] 1, 7, 1a

§ 508(a)(2)(C), 30 U.S.C. § 1258(a)(2)(C) [JS App. 56a] 7

§ 510(d)(1), 30 U.S.C. § 1260(d)(1) [JS App. 58a] 7, 1a

§ 515(b)(7), 30 U.S.C. § 1265(b)(7) [JS App. 61a]..... 7, 56, 1a

§ 515(b)(20), 30 U.S.C. § 1265(b)(2) [JS App. 62a] 7, 1a

§ 519(c)(2), 30 U.S.C. § 1269(c) (2) [JS App. 63a-64a] 7, 1a

§ 701(20), 30 U.S.C. § 1291(20) [JS App. 68a] .. 7

Section 101(b), 30 U.S.C. § 1201(b) [Motion to Affirm (MA) App. 1a] 17

Section 101(c), 30 U.S.C. § 1201(c) 41

Section 101(g), 30 U.S.C. § 1201(g) 37

Section 102(c), (k), 30 U.S.C. § 1202(c), (k) [MA App. 1a] 17

Section 503, 30 U.S.C. § 1253 30

Section 503(a)(1), (7), 30 U.S.C. § 1253(a)(1), (7) [MA App. 2a] 6

Section 504, 30 U.S.C. § 1254 30

Section 504(a), 30 U.S.C. § 1254(a) [MA App. 3a] 6

Section 507(d), 30 U.S.C. § 1257(d) 15, 3a

Section 508(a)(2), (3), (4), (8) and (10), 30 U.S.C. § 1258(a)(2), (3), (4), (8) and (10) [JS App. 56a] 9, 15, 16, 53, 3a

Section 510(b)(1), (2), (4), 30 U.S.C. § 1260(b)(1), (2), (4) [MA App. 4a] 13, 15, 58, 3a

Section 510(d)(1), (2), 30 U.S.C. § 1260(d)(1), (2) [JS App. 57a] 9, 10, 53, 56

Section 515(b)(2), 30 U.S.C. § 1265(b)(2) [MA App. 6a] 12

Section 515(b)(3), 30 U.S.C. § 1265(b)(3) [JS App. 59a] 5, 10

Section 515(b)(4), (8), (10), (11), (14), (16), 30 U.S.C. § 1265(b)(4), (8), (10), (11), (14), (16) [MA App. 7a-12a] 18

Section 515(b)(5), 30 U.S.C § 1265(b)(5) [JS App. 60a] 10

Section 515(b)(10), 30 U.S.C. § 1265(b)(10) [MA App. 8a] 46

Section 515(b)(19), 30 U.S.C. § 1265(b)(19) [JS App. 62a] 15, 16, 46, 3a

Section 515(b)(20), 30 U.S.C. § 1265(b)(20) [JS App. 62a] 15, 16, 3a

Section 515(c)(3)(A), 30 U.S.C. § 1265(c)(3)(A) [MA App. 12a].....11, 50

Section 515(e)(3)(A), 30 U.S.C. § 1265(e)(3)(A) [MA App. 13a].....11, 50

Section 518(c), 30 U.S.C. § 1268(c) [JS App. 63a]. 4, 61-63

Section 519(c)(2), 30 U.S.C. § 1269(c)(2) [JS App. 63a] 8, 9, 16, 46, 53, 54

Section 522, 30 U.S.C. § 1272 [JS App. 65a].. ..... 13, 14, 17, 30, 40, 41, 51, 59

Section 522(a), (c), (d), 30 U.S.C. § 1272(a), (c), (d). 13, 47, 58

Section 522(a), 30 U.S.C. § 1272(a) 13, 47, 58

Section 522(e), 30 U.S.C. § 1272(e) 13, 14, 47,59

Section 701(28), 30 U.S.C. § 1291(28) [MA App. 17a].14

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* 18

Tucker Act, 28 U.S.C. § 1491 61

30 C.F.R. § 701.5 15

30 C.F.R. § 730 *et seq.*, Subchapters C, D, F, G, K, and L 6

30 C.F.R. § 761.5 59

30 C.F.R. § 762.5 ..... 58, 59
30 C.F.R. § 785.17 ..... 8, 17, 53
30 C.F.R. § 807.12(e)(2)(i), (iii), (3) 16, 17
30 C.F.R. § 816.115 17
30 C.F.R. § 816.116 16
30 C.F.R. § 816.117 16
30 C.F.R. § 816.133 ..... 15, 17
30 C.F.R. § 823.15 ..... 8, 9, 54
45 Fed. Reg. 78461-499 (1980) 6
[Secretary's action on Indiana's submittal of State Program]
45 Fed. Reg. 52324 (1980) 17
[Amendment to 30 C.F.R. § 807.12 (e) (3)]

Legislative History

123 CONG. REC. 24426 (1977) 38
123 CONG. REC. 24427 (1977) 38
123 CONG. REC. 15709 (1977) 12
123 CONG. REC. 15713 (1977) 10
123 CONG. REC. 15719 (1977) 9
123 CONG. REC. 15721 (1977) 10
123 CONG. REC. 15778 (1977) 12
123 CONG. REC. 15790 (1977) 12
Final Environmental Statement, Permanent Regulatory Program Implementing Section 501(b), U.S. Dept. of the Interior, OSM-EIS-1 (1979) 41

Hearings on H.R. 2 Before Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 95th Cong., lst Sess. (1977) 18, 38, 41, 45

H.R. REP. NO. 95-218, 95th Cong., lst Sess. (1977) 10, 11, 41, 43, 45, 46

H.R. REP. (CONF. REP.) NO. 95-493, 95th Cong., lst Sess. (1977) 42, 54

S. REP. NO. 95-128, 95th Cong., lst Sess. (1977) 45

Report Of The Interagency Task Force On The Issue Of A Moratorium Or A Ban On Mining In Prime Agricultural Lands (1977) 42-45, 56

Publications

Currier, *Exploring the Role of Taxation in the Land Use Planning Process,* 51 IND. L.J. 27 (1975) 27, 37

Developments in the Law — Zoning, 91 HARV. L. REV. 1427 (1978) 25

Diamond, *Commentaries on The Federalist,* 86 YALE L.J. 1273 (1977) 21

Friendly, *Federalism: A Foreword,* 86 YALE L.J. 1019 (1977) 22

Liebmann, *Delegation to Private Parties in American Constitutional Law,* 50 IND. L.J. 650 (1975) 59

Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 YALE L.J. 1196 (1977) 25

Office of Technology Assessment, Congress of the United States, *The Direct Use of Coal — Prospects and Problems of Production and Combustion* (1979) 39, 40

L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) . 20, 25

OPINION BELOW

The opinion of the District Court [JS App. la-44a] is reported in 14 E.R.C. 1769 (1980).

CONSTITUTION AND STATUTES

The relevant portions of the Constitution of the United States and statutes are set forth in appendices to the Jurisdictional Statement and Motion to Affirm, citations to which are provided in the Table of Authorities.

STATEMENT

Appellees disagree with the Secretary's characterization of the Act and of the specifically challenged provisions. Appellees' response to these characterizations is in the Argument, Part I *infra*.

SUMMARY OF ARGUMENT

I. Through the challenged provisions, the Act operates directly on the States, mandating land use planning policies and controls, as well as governmental structures, procedures and criteria for land use decisions. The "prime farmland provisions" require that a State define prime farmland as defined by the Secretary of Agriculture, that a State require an operator commit to a postmining land use of farming, that the land actually be farmed and that in issuing permits to mine on prime farmland, a State consult with the Secretary of Agriculture. The approximate original contour (AOC), topsoil and prime farmland provisions as applied in Indiana have no variances and are intended to and actually require a row cropping use which cannot be varied even if the reclamation requirements are unnecessary to, or in fact prohibit, certain postmining land uses. The States are required to establish procedures and criteria for the pre-permit approval of changes in the postmining land use by which the reclamation plan requirements result in a required land use for periods of five to ten years. By the areas unsuitable provisions, the States are required to zone areas

where surface coal mining is banned, as well as to establish a procedure whereby, under dictated criteria, other land can be zoned as unsuitable for surface mining.

Land use planning and control is an integral governmental function necessary to the separate and independent existence of the States pursuant to the Tenth Amendment and Federalism principles inherent in the Constitution. Land use planning cannot be viewed and defined by single dimension analysis— as but an exercise of the States' police power subject to preemption by congressional exercises of the Commerce Clause, just as governmental services of police and fire protection, schools, hospitals and parks transcend being viewed solely as an exercise of the police power. Land use planning policies and controls involve evaluating, establishing and zoning wholly intrastate private and State non-commercial, as well as commercial, activities in order to effectuate locally determined policies concerning the nature of and the quality of life in local communities, matters and goals which transcend economics.

Land use planning policies and controls of a State are a hybrid governmental service by which the nature of the existence of local communities is defined, and involve the most fundamental application of local control and accountability, concepts which are at the core of Federalism principles. Moreover, land use planning is an exercise of a State's quasi-property interest in its lands which, if regulated by the Federal Government under the Commerce Clause, would constitute the regulation of the States as States, and raise serious Fifth Amendment questions.

The manner of the exercise of the Commerce Clause power through the challenged provisions in the case at bar is not directed at the relief of a national emergency, nor is it limited in time. These policies will have disastrous consequences for the State of Indiana and some of its local communities, which well demonstrate the folly of Federal land use planning.

II. The Secretary does not contend (except as to prime farmland) nor did Congress have a rational basis to conclude that a change in the utility of surface mined land from industry, housing, forestry, farming or recreation to one or the other uses has a significant adverse effect on interstate commerce. Moreover, Congress had no rational basis to determine that surface mining on prime farmland has any significant adverse effect on interstate commerce. The prime farmland provisions are not a means reasonably and plainly adapted to removing a substantial adverse effect on interstate commerce. None of the challenged provisions are a means reasonably and plainly adapted to alleviating interstate spill-over effects of pollution, or any substantial effect on commerce.

III. On land in parts of the country other than Indiana, variances are allowed if the original contour requirements are unneccessary to and variances will faciliate a given proposed postmining land use. However, the prime farmland and AOC provisions have no variances for lands within Indiana where such provisions are unnecessary to a postmining land use or when they in fact prohibit certain postmining land uses. The denial of such a variance from the prime farmland and original contour requirements as applicable in Indiana is a denial of equal protection and substantive due process pursuant to the Fifth Amendment because the only legitimate purpose is the removal of substantial adverse effects on interstate commerce, which interest these provisions do not serve. To the extent that specific land uses are not required by the challenged provisions as the Secretary asserts, when such provisions are unnecessary to the proposed postmining land use, they are irrational and tantamount to economic waste.

IV. The prime farmland provisions and the areas unsuitable provision constitute a taking of coal in that they deny coal operators any beneficial use of the coal by preventing coal from being extracted. If coal cannot be extracted, it has no use whatsoever and these provisions

prevent the extraction of coal and, therefore, constitute a taking without just compensation contrary to the Fifth Amendment taking clause.

V. The requirement of § 518(c), that proposed civil penalties must be prepaid before the operator is given an opportunity for a hearing in order to contest liability or the amount of the penalty, is contrary to the procedural due process requirements of the Fifth Amendment. If welfare payments cannot be revoked without a hearing, surely money actually earned cannot be taken without a hearing.

ARGUMENT

I. INTRODUCTION: NATURE OF THE CHALLENGED PROVISIONS

Any analysis of the constitutional questions presented must begin with an indepth understanding of the few, but complicated, challenged provisions of Title V of the Surface Mining Control and Reclamation Act,[1] and how these provisions subtly, but quite directly, operate upon the States by dictating land use policies as well as governmental structures, procedures and criteria for making decisions on land use policies, all on pain of Federal usurpation. To the contrary, the Secretary's brief is a calculated attempt to disguise, obfuscate and bury the few challenged provisions within the whole of Title V so as to make it appear that these few provisions are solely related to the private activities of coal operators, and not related or only incidentally related to land use planning and control. The Secretary, for all practical purposes, has now conceded that the challenged provisions are not related to water pollution control, but

---

[1] See § 501 *et seq.* [30 U.S.C. § 1251 *et seq.* (Supp. 1979)] which will be referred to hereinafter by section numbers of the Act. The corresponding U.S.C. cites are provided in the Table of Authorities. The Act is hereinafter referred to as such. The Secretary's brief on the merits in the instant case and in No. 79-1538 will be cited as "Ind. Br." and "Va. Br." respectively.

now contends that the provisions are related to the "productivity" or "utility" of land, which are at the heart of land use planning and control.

The Secretary's attempt to infuse the Indiana case into the Virginia case is but another aspect of the Secretary's effort to obfuscate the issues in this case. There are significant differences. Under the Tenth Amendment issue, while limited aspects of the original contour requirements [§ 515(b)(3), hereinafter "AOC"] are also involved in the Virginia case, a variance from the AOC requirement is allowed for steep slopes and mountaintops based on the proposed postmining land use, while in Indiana no variance is allowed; and in the Indiana case, the prime farmland provisions, areas unsuitable provisions, and the pre-permit land use approval provisions are involved, while they are not in the Virginia case. Under the Commerce Clause issue, the Virginia case challenges the entirety of Title V, while the Indiana case focuses on a few specific provisions [approximately 21 of over 280 subsections].

Before addressing the precise questions presented, appellees will first demonstrate that the challenged provisions of the Act, which the District Court found to be contrary to the Tenth and Fifth Amendments as well as beyond the Commerce Clause power, operate on the States, and then demonstrate that the true nature of those provisions is direct Federal land use planning and control.

(A) The Act Operates Directly On The States

Under the permanent phase of the regulatory scheme established by the Act, each State, in order to retain jurisdiction over the regulation of surface coal mining and reclamation operations as well as the land use planning functions encompassed by the Act, must submit a State Program, including "a State law. . . in accordance with the requirements of this Act" and "regulations consistent with

regulations[2] issued by the Secretary pursuant to this Act" [§ 503(a)(1) and (7)], or else those functions will be usurped by a Federal Program promulgated and administered by the Federal Government [§ 504(a)]. Thus, on threat of Federal usurpation, in order to retain their sovereign land use planning and control functions, the States have no choice[3] but to enact laws and pass regulations containing land use policies as well as providing governmental structures, procedures and criteria for further land use decisions which must be mirror-images of those dictated by the Act.

---

[2] The true impact of the requirement that a State program comport to the regulations of the Secretary does not become fully evident until the Secretary's regulations are reviewed [30 C.F.R. §§ 730 *et seq.*, Sub-chapters C, D, F, G, K and L, pp. 977-1252], that is, the 300 pages of fine print regulations constituting further commands of the Secretary which the State Programs must parrot.

[3] As found by its General Assembly, the State of Indiana was "coerced" into enacting enabling legislation so that an Indiana program would comport to the Surface Mining Act, and it did so only to avoid the "Federal encroachment". IND. CODE § 13-4.1-1-1(2) and (4) (Supp. 1980), set forth in Appendix C hereto.

As the Secretary notes, Indiana has submitted a program, including a State statute, which the Secretary found inadequate [Ind. Br. 4 n.4]. A reading of the Secretary's "decision" concerning the Indiana Program illuminates the problems for "our Federalism" of giving Federal bureaucrats review powers over State laws. The Secretary found the Indiana statute insufficient for, among other reasons: (1) it provides for more complete standards of judicial review than allowed under the Act [Finding 27.2]; (2) it requires an adjudicatory hearing, as opposed to an informal conference for objections to a permit [Finding 22.11]; (3) it requires an adjudicatory hearing rather than a legislative type hearing to declare land unsuitable for surface mining [Findings 21.2 and 22.10]; (4) it does not have the same venue provisions for lawsuits, as under the Act [Finding 22.9]; (5) it would change the "common law" for premises liability [Finding 17.7]; (6) it would allow too much information submitted by coal operators to be privileged [Finding 13.3]. [45 Fed. Reg. 78461-499 (1980).] Now the General Assembly of Indiana must change its laws concerning concepts of judicial review and rights of parties to administrative hearings, as well as land use planning, to gain an approved State Program.

(B) Land Use Planning And Control Provisions

(1) *Prime Farmland Provisions.*[4] These provisions are totally unrelated to water pollution control[5] and are singularly and solely land use control and planning devices. These provisions require that: (l) prime farmland be defined as required by regulations of the Secretary of Agriculture without regard to what is actually prime farmland within a State based on State determined land use policies;[6] (2)

[4] The "prime farmland provisions" [§§ 507(b)(16), 508(a)(2)(C), 510(d)(l), 515(b)(7), 701(20) and parts of §§ 515(b)(20) and 519(c)(2)] are described in Appendix A hereto, as well as being set forth verbatim in JS App. and MA App. [see p. viii *supra*].

[5] The prime farmland provisions actually *increase* water pollution by causing sedimentation [JS App. 16a].

[6] The location of prime farmlands in Indiana in reference to surface mineable reserves is set forth on four maps [JA 65-68]. These graphically illustrate the lack of land use conflict between surface coal mining and the use of prime farmlands in Indiana. Exhibit 4 demonstrates that the vast majority of prime farmland is not located over surface mineable coal. Several statistics bear out this graphic illustration based on the maps— six counties in southwestern Indiana [JA 8l-82] account for 80% of the coal produced in Indiana [99% of the coal produced in Indiana is by the surface method, JA 72-75], while these same six counties account for less than 5% of row crop production in Indiana [JA 83-94].

The land use policies behind the prime farmland provisions were based on studies done in Illinois which have no applicability to Indiana. The studies were based on the experience that Illinois, which has large amounts of its surface mineable coal reserves under prime farmland, could meet its coal needs by underground mining [JA 5l-52], where 50% of the coal is mined by the underground method [JA 73]. [In fact, Illinois had laws protecting against this land use conflict, but Senator Stevenson did not trust state "bureaucrats" to exercise the proper discretion. See note 8 *infra.*] The Senator from Illinois constantly repeated this Illinois experience in support of the prime farmland provisions. However, such is not the case in Indiana where 99% of the coal is mined by surface mining [JA 8l] because Indiana's "underground mineable reserves" are poor and not presently mineable [JA 77-80], while 88% of Illinois' coal reserves are only underground mineable [note 8 *infra*]. The result will be to totally displace surface mining in Indiana into underground mining in Illinois and Kentucky [JA 80, l48-52]. Such land use planning in Indiana based on the conditions in Illinois demonstrates the folly of Federal land use planning.

mined prime farmland be returned to farming after mining as a condition to permitting surface mining on prime farmland; (3) the postmining land use be farming for at least ten years;[7] and (4) a State consult with the Secretary of Agriculture before issuing a permit to mine on prime farmland.

---

[7] This farming use is required by the express language of the prime farmland provisions. *See In re Permanent Surface Mining Regulation Litigation,* No. 79-1144, slip op. at 5, (D.D.C. May 16, 1980), where in sustaining the validity of 30 C.F.R. § 785.17(d)(1), which requires that an operator commit to row cropping as the postmining land use, held:

> Illinois mistakenly reads Section 515(b)(2) in isolation [*i.e.,* that it affords the operator an open ended choice as to the post-mining land use]. . . . [T]he Act prescribes additional and specific requirements for prime farmland. For example, the SMCRA prohibits release of bond *"until soil productivity for prime farmlands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area. . ."* Section 519(c)(2) of the Act. . . . This equivalency standard could not be achieved absent the post-mining employment of prime farmland as cropland.
>
> Section 510(d)(1). . . corroborates the imposition of an additional requirement for mining on prime farmland: *the land must be reclaimed and used as cropland.* [Emphasis added.]

The required farming use results, in part, because it will take up to ten years of continuous farming to make the demonstrations required for the release of the bond pursuant to § 519(c). The land cannot be returned to prior levels of yield unless an actual farm use is made of the land. See also note 82 *infra,* and discussion of studies, Part V *infra.* The Secretary admitted this fact in his comments to the proposed regulations, 30 C.F.R. § 823.15. [44 Fed. Reg. 15287 (1979), set forth at JS App. 30a.]

In the rules litigation before the District Court for the District of Columbia, *id.,* the District Court issued two separate opinions, Round I, 14 E.R.C. 1083 (February 26, 1980), and Round II, presently unpublished (May 16, 1980). There, the Secretary repeatedly contended that actual row crop use was required by the prime farmland provisions, while in the case at bar the Secretary contended to the contrary. [See Ex. A. to Trial Brief, R. 1294.] Both decisions of the District Court are pending appeal, No. 80-1810 *et seq.* (D.C. Cir. August 26, 1980), and the Secretary recently filed a brief contending in support of his regulation requiring row cropping as the designated use [30 C.F.R. § 785.17(d)(1)] and the regulation requiring three test years of

(con't)

The Secretary largely ignores these aspects of the prime farmland provisions and attempts to distort and disguise them by engaging in semantical games, as through the statements that—although the Act "encourages the farming. . . following reclamation, it does not require such use," or—"the Act does not mandate that mined lands actually be used for any specific purpose after reclamation is completed" and the bond is released [Ind. Br. 23]. What the Secretary is disguising, is that the postmining land use of farming is required, as intended by Congress,[8] for at least ten years before the bond is eligible for final release, by which time the opportunity for changing land uses is gone and, therefore, certain land uses are, in effect, prohibited.

---

yields or actual cropping usage [30 C.F.R. § 823.15(b)] based on § 508(a)(2)(C), § 510(d) and § 519(c)(2), that "the Act requires that prime farmland be restored to crop land" [Br. 53], "the statute *requires* prime farmland to be restored to prime farmland. This should end the inquiry on the Secretary's authority to require row crop production. . ." [Br. 57], and "in three separate sections of the Act— permit application, permits, and bond release—Congress stressed the importance of yields from prime farmland; only actual production will produce crop yields." [Br. 58; see also *id.*, at 196-203].

[8] [T]hat caveat of a higher or better use [in § 515(b)(2)] is the hooker. That is the loophole you can drive a truck through. I shall tell why. The effect of this amendment [prime farmland provisions] is to set a standard for reclamation of prime farm lands. Without this amendment, someone in the short term can determine that a better use is a recreational use; a better use is a residential use; a higher use is an industrial use. *We are giving all that discretionary authority to some bureaucrat.*

I do not want to do that. . . . [123 CONG. REC. 15719 (1977) (statements of Sen. Culver)].

Eighty-eight percent of this [Illinois] coal can be extracted only by deep mining. Only 12 percent, or about 19.5 billion tons, can be stripped, but about half of our current production comes from strip mines. The deep-mine coal is concentrated in the south-central region of the State.

* * *

Our State has one of the best regulatory statutes, but it is not adequate with respect to prime farmlands. It gives the

(con't)

Despite the Secretary's semantical sleights, it remains that the prime farmland provisions are indeed unadulterated Federal land use planning policies, intended by Congress to be such, which will be implemented in Indiana through a State Program which must meet the Federal requirements, or directly usurped through a Federal Program, formulated and administered by the Federal Government. Even if a State obtains the Secretary's approval of a State Program, the State can issue permits to mine on prime farmland "only after consultation with the Secretary of Agriculture" [§ 510(d)(1)].

(2) *Topsoil And AOC Provisions.* Land use policy concepts are implicit in the AOC, topsoil [§ 515(b)(5)][9] and prime farmland requirements as demonstrated by the absence of variances from the requirements of these provisions. For example, where mining occurs on mountaintops or steep slopes, which are not present in Indiana, variances are provided from the AOC requirement if other than the original contour is "compatible with" a

---

director of the department of mines and minerals the discretion to decide whether row crop agriculture is the optimum future use of land to be mined . . . . [123 CONG. REC. 15721 (1977) (emphasis added) (remarks of Sen. Stevenson).

For the first time, the Federal Government would be taking into account that these prime agricultural lands are an invaluable resource to us, and we cannot simply pave over them, we cannot simply urbanize them all— and we simply cannot strip mine them, *unless we assure ourselves that all prime lands that are mined will be returned to their original use and their original level of productivity.* [123 CONG. REC. 15713 (1977) (emphasis added) (remarks of Sen. Percy).]

[9] Section 515(b)(3) requires that mined land be returned to its approximate original contour after mining. For a pictorial translation of this requirement see H.R. REP. NO. 95-218, 95th Cong., lst Sess. 104 (1977). Section 515(b)(5) provides that the topsoil of mined land must be removed, stored and replaced in a separate layer.

proposed postmining land use which is an "equal or better economic or public use" of the affected land, as compared with its premining use [§ 515(c)(3)(A), (e)(3)(A)]. The Act allows no meaningful variances from the AOC, topsoil and prime farmland provisions for lands in the Midwest, even where these provisions are unneccessary to or would prohibit a particular postmining land use as residential, industrial, forestry or recreational uses. In other words, variances are allowed only where the Federal Government has predetermined, there can be an "equal or better economic or public use" of the local land. Variances are not allowed in Indiana because the Federal Government has predetermined that there is no equal or better land use following mining, and in the case of prime farmland, that the highest and best use is farming.

By the Secretary's admission, the reason for the absence of variance provisions from the AOC, topsoil and prime farmland provisions for lands in Indiana is a Federal land use policy "decision."[10] Indeed, that there is no other reason for the refusal to allow such variances in Indiana is apparent from the Congressional Record and the history of the Act. The House and Senate expressly noted that surface mining presents an opportune time to change the use of land,[11] but that variances from the prescribed standards were only permitted where the Federal Government predetermined that a "better" use would result.

---

[10] In the Virginia case, the Secretary emphasizes the variances allowed for the AOC requirement on steep slopes in support of his argument that such sections do not impinge upon the sovereignty of the Commonwealth of Virginia [Va. Br. 35], contending that such variance procedures ensure that "[t]he impact of the Act *on the land-use decisions* will thus be no greater than necessary. . ." (emphasis added). If the granting of a variance is a land use decision, the denial of a variance is equally a land use decision.

[11] "[S]urface mining also presents possible land planning benefits as such mining involves the opportunity to reshape the land surface to a form and condition more suitable to man's uses." [H.R. REP. NO. 95-218, 95th Cong., lst Sess. 94 (1977).] (con't)

Moreover, at the time the Act was originally passed by the Senate, a variance was provided from the AOC requirement for all lands, not just steep slopes or mountaintops, based on land use planning considerations.[12] However, in the Committee of Conference, without any rational basis, the uniform land use variance from the "rigid" contour requirement was restricted to only steep slopes and mountaintops, not found in Indiana. Again, the predetermined Federal land use policy is that in Indiana, land uses which could result from such variances are deemed not to be equal or better land uses.

These predetermined Federal land use policies effectuated through the absence of variances are most blatant in the case of the prime farmland provisions. Several Senators remarked at the time of the prime farmland amendments that the mere requirement that land be restored to equal or better use [§ 515(b)(2)] was not considered sufficient for prime farmland, and that a postmining farming use must be required because the Senators did not want State "bureaucrats" to have the discretion to allow a postmining land use other than farming [see note 8 *supra*]. Hence, the absence of variances from the AOC, topsoil and prime farmland provisions demonstrates that the Federal Government predetermined that there can be no equal or better land use, regardless of what may be the local land use planning and control policies or needs.

"[T]he technology of reclamation has come a long way. If the law is framed wisely and reasonably— without rigid contour requirements— there is no reason why further beneficial land uses cannot be carried out on reclaimed land.

* * *

"It must be borne in mind that protection of environmental values does not in every instance require return to an original contour." [123 CONG. REC. 15709 (1977) (remarks of Sen. Byrd).]

[12] See § 415(d), 123 CONG. REC. 15778, 15790 (1977).

(3) *Areas Unsuitable Provisions.* The most flagrant example of federally dictated State governmental structures, procedures and criteria for land use decisions is the areas unsuitable provisions. Section 522(a), (c) and (d) requires that a specific governmental structure and procedure be established [irrespective of Indiana's present structures, procedures and criteria] to zone land unsuitable for surface coal mining and delineates the relevant criteria for such zoning, which are totally unrelated to air and water quality, as whether mining is incompatible with "local land use plans or programs" or affects "fragile or historic lands" where significant damage could result to "important historic, cultural, scientific, and esthetic values. . ." [§ 522(a)(3)]. A permit cannot be issued to mine on land that has been zoned unsuitable for surface mining [§ 510(b)(4)].

The Secretary's response is but to state that the District Court's conclusion that § 522 is solely directed at land use control and planning policies and governmental structures is "especially puzzling" [Ind. Br. 24]. The Secretary fails to comprehend that which is apparent on the face of § 522(a), (c) and (d)— this provision mandates a State to establish a land use policy, procedure, criteria and governmental structures on pain of Federal usurpation with the land use decisions actually being made by the Federal Government. Indiana already has governmental structures, procedures and criteria for such zoning, the authority for which is generally reposed in locally elected County officials, not appointed administrative personnel at the state level as required by § 522 [see IND. CODE § 18-7-4-8, 36, 46; note 34 *supra*]. The only thing that is "puzzling" is the Secretary's failure to comprehend the obvious.

Similarly, as to road relocations and closings, Indiana is mandated by § 522(e)(4) to change its governmental structures and procedures by which such decisions are

presently made through County Commissioners and the Indiana State Highway Commission,[13] or to relinquish its right to make these decisions to the Federal Government. The Secretary, apparently again finding the obvious puzzling, has chosen to ignore this issue. Or maybe the Secretary assumes that it is obvious that the States are no longer competent to determine how to protect State and County highways, or to determine appropriate governmental structures and procedures for road relocations and closings, (i.e., that locally elected County officials should make such determinations as opposed to appointed state level personnel).

In addition, § 522(e)(4) and (5) zones certain lands off-limits to "surface coal mining operations" [defined in § 701(28)], which encompasses innocuous activities such as the parking of vehicles or the storing of materials used in the mining operation, not just mining, blasting or other similar activities. The Secretary, now choosing to distort the Act, counters [Ind. Br. 19] that this zoning is necessary to "ensuring that the *extraction of coal* does not endanger life and property. . . ." (Emphasis added.) If the challenged provision were limited to "coal extraction" as the Secretary claims, at least the Secretary's "characterization" might be correct (which it is not), but even so, it would not change the land use zoning nature of this provision.

(4) *Pre-Permit Approval Of Land Use And Required Land Use Provisions.* The District Court also

---

[13] See IND. CODE § 8-20-8-1 *et seq.*; IND. CODE § 8-20-1-1 *et seq.*; Conclusion No. 14, JS App. 34a. Pursuant to § 522, the locally elected Board of County Commissioners will not be able to decide road relocation and closing issues, contrary to the selected Indiana governmental structure, procedures and criteria; rather the State regulatory authority must decide such issues because such changes in State government structure are mandated by § 522 (e) (4), on pain of Federal usurpation of those functions and decisions.

found unconstitutional [JS App. 10a, 11a, 19a] those provisions of the Act which combine to require specific State governmental structures and criteria for approving proposed postmining land uses, again, irrespective of existing State governmental structures and criteria. Through the permitting procedures and reclamation plan requirements of the Act, a State must enact laws to require that a mine operator obtain approval to change the postmining use of the land from that which existed before mining, §§ 507(d), 508(a)(3), (4), 515(b)(19), (20) and 510(b)(1), (2).[14] These provisions resulted in regulations requiring the approval of postmining land use changes,[15] which define precisely what is deemed to be a change in land use, through ten land use categories, ranging from "cropland" to "undeveloped land" [30 C.F.R. § 701.5], and which read like zoning ordinances. The premining land uses must be determined in accordance with whether the land was properly managed and, further, if the premining use of the land was changed within five (5) years prior to its acquisition by the permittee, then the postmining land uses must be compared with the historic use of the land [30 C.F.R. § 816.133(b)]. Not only are specific governmental structures and procedures mandated, but the specific criteria by which the approval of the proposed change in postmining land use will be decided are established and required.

The Secretary fails to meaningfully discuss these pre-permit procedures and requirements of the Act. These are more than mere information requirements. Rather, by these

---

[14] See Appendix B *infra*.

[15] In 30 C.F.R. § 701.5, under definitions of land use, it is provided:

> *Land use* means specific uses or management-related activities, rather than the vegetation or cover of the land. . . . Changes of land use or uses from one of the following categories to another shall be considered as a change to an alternative land use which is subject to approval by the regulatory authority.

provisions a permit to mine is conditioned on federally dictated criteria for a required approval of land use changes. Furthermore, by these provisions the Federal Government subtly dictates land use by reclamation and revegetation standards, the completion of which hinges on an actual land use which is designated and required. This use requirement is,again, disguised by the semantic sleight that no land use is required after reclamation is accomplished and the bond is released. But in the interim [the five or ten year period before the bond is eligible for final release, depending on rainfall (§ 515(b)(20))], rigidly structured reclamation and revegetation regulations based on the Act are such that if the designated land use is row cropping (of nonprime farmland), forestry, or fish and wildlife, etc., a mining operator must specifically use the land for such purposes to achieve the requirements before reclamation is deemed completed and the bond is released.[16] To have an approved State Program,

---

[16] Not only does the Act require the approval of any changes in the land use from premining to postmining, but the reclamation plan requirements [§ 508(a)(3), (4)], when combined with the requirements for the release of bonds [§ 519(c)], require the actual use of land during the reclamation period, which is up to five or ten years [§ 515(b)(19), (20)]. This result is manifestly clear through the regulations.

For instance, 30 C.F.R. § 807.12(e)(2)(i), (iii) provides that part of the reclamation bond shall be released after "reclamation phase II is completed" which is deemed to be when "[r]evegetation has been established in accordance with the approved reclamation plan and the standards for the success of revegetation are met." The revegetation standards directly *require the approved postmining use during reclamation.* Additionally, as to proposed row crop land use (but not on prime farmland), "success in revegetation" is determined by *two years* of actual row crop farming use [30 C.F.R. § 816.116(b)(3)(iii)]. If the postmining use is to be an industrial or residential use, the only ground cover required is that which is required to control erosion [30 C.F.R. § 816.116(b)(3)(ii)]. As to a fish and wildlife land use, success of revegetation is determined on the basis of required tree, shrub or half-shrub stocking and ground cover. [*Id.*, subsection (iv).] In 30 C.F.R. § 816.117 the required ground cover for forestry purposes is set forth which can result in only a forestry land use during the five to ten year period of liability. With respect to approved postmining land uses of range and pasture land, 30

(con't)

the States must parrot both the Act and these regulations.

(5) *Miscellaneous.* Finally, the prime farmland, topsoil and AOC provisions, which have no meaningful variances applicable in Indiana, are a part of the federally dictated land use policy of making surface mining an unpreferred land use to underground coal mining and farming, regardless of a State's land use policies and needs.[17] The Secretary does not and cannot refute this land use control and planning policy of the Act. In fact, many viewed these provisions of the Act not merely as a land use preference for underground coal mining and farming land uses, but rather viewed the Act as the beginning of the phase-out of surface mining in the United States.[18]

C.F.R. § 816.115 originally required that the land actually be used for two years for grazing and, as to prime farmland, this is deemed to be when the soil productivity has been returned to the level of yield as was required by 30 C.F.R. § 785.17 [suspended pending appeal].

As to the actual bond release in the final Phase III of reclamation, originally the permittee must have "successfully completed. . . the implementation of any alternative land use plan approved pursuant to Section 816.133. . . ." 30 C.F.R. § 807.12(e)(3). This was subsequently amended to provide that Phase III would be completed when the permittee "has completed all. . . reclamation operations in accordance with the approved reclamation plan so the land is capable of supporting any postmining land use approved pursuant to 30 CFR 816.133. . . ." [45 Fed. Reg. 52324 (1980).] However, as noted above, the revegetation requirements which must be accomplished during the period of liability [five or ten years] are such that a required use exists during the reclamation period, which makes the amendment as to Phase III of no moment because an actual use is still required.

[17] This is expressly set forth in §§ 101(b), 102(c), (k), 515(b)(12) and 522.

[18] At the hearings on the Act it was stated on behalf of the Environmental Policy Center, *amicus* herein:

> The abolitionists have a long history behind them to convince even the optomistic [sic] that a strong law will not eliminate the damages and suffering because tough laws have been past

(con't)

All the above provisions are unrelated to the control of pollution, which further supports the conclusion that the land use control and planning results of these provisions are not merely "incidental," as the Secretary contends. This conclusion is compelled when it is considered that the Act, in numerous other provisions,[19] contains requirements clearly directed at water pollution control. The Secretary does not contest this except with respect to the topsoil provision.

[sic] before but have not been enforced. For them, only abolition will solve the problems and put an end to the destruction.

I see the need for a phase-out from their perspective but I see the need for a phase-out from a National coal policy perspective also. It may sound incongruous, to suggest a coal policy based on legislation what [sic] would preclude the mining of 55% of our present coal production. . . .

* * *

This legislation, with a phase-out of surface mining over a realistic time period, can be the important step forward as we begin to use our coal reserves. . . . [*Hearings on H.R. 2 Before the Subcomm. on Energy and the Environment of the Comm. on Interior and Insular Affairs, House of Representatives,* 95th Cong., lst Sess., Part IV 390, 395-96 (1977) (hereinafter *"House Hearings on H.R. 2"*).]

[19] See Findings No. 7, 8, 9, Conclusion No. 2, JS App. 16a-18a. Those provisions are §§ 515(b)(4), (8), (10), (11), (14), (16) and (19). On the basis of these provisions, the regulations promulgated by the Secretary require the use of sediment ponds and treatment ponds to control the four identified water pollutants—iron, manganese, suspended solids and acidity (pH), which are not controlled by any of the provisions challenged by appellees, and that surface drainage from non-point sources be controlled through reclamation and bond release. All of the foregoing requirements are in addition to or maybe even duplicitous of the control of point sources under the national pollutant discharge elimination standards of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* Finding No. 7, JS App. 16a. See *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980); *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979).

II. THE CHALLENGED PROVISIONS ARE CONTRARY TO THE TENTH AMENDMENT

Contrary to the impression conveyed by the Secretary, appellees are not ogres of recidivism seeking to overrule and sweep aside fifty years of precedent and federal regulatory legislation. The Secretary creates this impression by recasting appellees' contention to be that the regulation of surface mining is an integral State governmental function [Va. Br. 32], or by recasting appellees' arguments to be that this Court has held that "the federal government may not regulate private activities that affect interstate commerce if such regulation has any effect on land use,"[20] and by similarly recasting the District Court's holding [Ind. Br. 21-22].[21] These are neither appellees' assertions nor the District Court's holding.

The District Court correctly perceived that the *specific provisions* challenged are not merely incidentally concerned with land use control and planning, but rather have as their major, if not sole, purpose Federal land use control and planning [see Part I *supra*], and correctly reasoned that "[l]and use control and planning is a

---

[20] Appellees do not assert that land use control and planning *under all circumstances and situations* is reserved exclusively to State and local governments. A national emergency may require some action which may result in some type of Federal land use control. *See, e.g., Fry v. United States,* 421 U.S. 542 (1975); *United States v. Central Eureka Mining Co.,* 357 U.S. 155 (1958). However, this is not the issue now before the Court.

[21] The issue is not whether Congress can regulate interstate commerce "if such regulation has any effect on land use." [Ind. Br. 22.] Obviously any provision regarding environmental protection has some effect on land use; however, that is not being challenged. The issue is whether the Federal Government may impose land use decisions, as well as governmental structures, criteria and procedures for such decisions upon State and local governments based on the Federal Government's determination of the highest and best use of certain types of land, or whether it can directly usurp such decision making and implement Federal governmental structures and procedures.

traditional or integral governmental function or area of State sovereignty,"[22] essential to the separate and independent existence of the States. *National League of Cities* established that the very nature of the Federal system imposes certain restraints on the Federal Government's plenary power under the Commerce Clause which had been recognized as to other powers.[23] Even though an act of

---

[22] Conclusion No. 3, JS App. 28a. Obviously, this is a new question of law for this Court to determine under its ultimate judicial review authority. The cases of this Court cited by the Secretary [*Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942)] did not involve the question presented in the case at bar and are so easily distinguishable as to deserve no further comment. Also, the matters involved in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), and *United States v. California*, 297 U.S. 175 (1936), are in no way similar to land use planning and control. The lower court cases cited by the Secretary also have no applicability. *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974), was decided before *National League of Cities v. Usery*, 426 U.S. 833 (1976), and involved potential interstate spill-over effects of air pollution. *United States v. Helsley*, 615 F.2d 784 (9th Cir. 1979), did not involve land use planning and control but merely concerned safety in air traffic which has historically been treated specially by this Court.

[23] *National League of Cities v. Usery*, 426 U.S. 833 (1976), of course, was not this Court's first expression of concern for the limits imposed by Federalism. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 302 (1978). The real question, as postured by Professor Tribe, is:

> Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions- in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell. The real question, therefore, is this: short of its prohibition of Armageddon, does the Constitution grant the states any judicially enforceable protection from Congress?

National League of Cities answered the inquiry in the affirmative, just as the Court has in other areas. *See United States v. Nixon*, 418 U.S. 683 (1974); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Moreover, Justice Rehnquist recognized that "important decisions of constitutional law are not subject to the same command of stare decisis as are decisions of statutory questions. Surely there can be no more fundamental constitutional question

(con't)

Congress may be within the scope of the Commerce Clause, Congress may not exercise this authority in a manner so as to impair attributes of sovereignty attaching to every State Government, particularly integral governmental functions essential to the separate and independent existence of the States [426 U.S. at 845].

Obviously, the Secretary would like to limit *National League* to only holding that the Federal Government may not dictate the wages which a State must pay its employees. However, *National League* is but a part of the evolution of the "limits imposed by federalism," which evolution must take place "just as our understanding of Congress' power under the Commerce Clause has evolved."[24] Anything short of such balanced evolution will eventually leave but a national constitution, as opposed to the "compoundly federal and national constitution" as intended and actually structured by the Framers.[25]

If the Commerce Clause has evolved to the extent of reaching local activities which affect commerce "even in the minutest degree",[26] then Congress quite obviously can extend its powers into areas "never intended"[27] or

---

than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments," *Fry v. United States,* 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting), and suggested that *Maryland v. Wirtz,* 392 U.S. 183 (1968), be overruled, as it subsequently was in *National League of Cities.*

[24] *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 421 n.2 (1978) (Burger, C.J., concurring). It may be that "experience" and not "logic" or even political philosophy is at the base of the evolution of Federalism principles. *California v. United States,* 438 U.S. 645, 646 (1978).

[25] Diamond, *Commentaries on The Federalist,* 86 YALE L.J. 1273, 1282-83 (1977).

[26] *Maryland v. Wirtz,* 392 U.S. 183, 204 (1968) (Douglas, J., dissenting), *overruled, National League of Cities v. Usery,* 426 U.S. 833 (1976).

[27] As but one example—if the postmining land use of prime farmland can be restricted by Congress to farming, effectively (con't)

contemplated by the Framers of the Constitution[28] contrary to the implicit Federalism concepts. The necessity for the concomitant evolution of the limits imposed by Federalism on the Commerce Clause power as it affects the attributes of sovereignty of the States, is self-evident.

National League and the Federalism principles implicit in the Constitution demand a two-fold inquiry. First, is the affected area an integral governmental function traditionally performed by State and local governments essential to the separate and independent existence of the States? Second, do the challenged provisions act on the States as States? These inquiries at some point blend and in the case at bar encompass at least two very fundamental questions as what is a "State" and what is land use control and planning, both of which must be viewed in light of the delicate State-Federal structure implicit within the Constitution as well as the history and "experience" of land use planning and control.

(A) **Land Use Planning And Control Is An Attribute Of State Sovereignty.** Land use planning and control is an attribute of sovereignty necessary to the separate and independent existence of the States because (l) it

---

prohibiting any other use, including non-commercial uses [based on a negligible effect on interstate commerce], the Commerce Clause has been extended to reach local non-commercial activity, both public and private. Based on the asserted yearly change in use of one million acres of land from agricultural production, of which 98% is due to urbanization and water needs and only 2% is due to surface coal mining [the yearly wasted agricultural productivity through the Agricultural Stabilization Program is *200 times more than* this amount of prime farmland affected by surface mining], the Federal Government seeks to mandate land use planning and control on mined prime farmland. Assuming this to be a substantial adverse effect on interstate commerce supporting the purported exercise of the Commerce Clause power, then the Federal Government can enact land use planning and control over the remaining 98% of converted prime farmland. This will propel the Federal Government into the heart of urban and water resource land use planning and control— directly into non-commercial State and private activity.

[28] Friendly, *Federalism: A Foreword,* 86 Yale L.J. 1019 (1977). See also *Perez v. United States,* 402 U.S. 146, 157 (1971) (Stewart, J., dissenting).

encompasses the process of evaluating, establishing and zoning wholly intrastate non-commercial State and private activity, as well as commercial activity, in order to effectuate the desired nature of and the quality of life in local communities, which is not the private business activity differentiated in *National League;* (2) it cannot be viewed in a single dimension as an exercise of the police power; rather land use planning is a hybrid governmental service by which States and local communities define and effectuate the nature and quality of their existence as well as governmental fiscal structure; (3) Federalism principles involve concepts of local self-determination and accountability essential to the determination of the nature of and quality of the existence for local communities and their people; (4) land use planning and control is in fact the manifestation of a physical quality of a State in that it is a State's use of its lands, that is—an assertion of a State's quasi-real property interest in the land within its borders; and (5) the presumed local benefit-burden resulting from land use planning and control or the "average reciprocity of advantage" becomes nonexistent if exercised by the Federal Government under the Commerce Clause and would raise serious Fifth Amendment questions.

The Secretary attempts to view and define land use planning and control solely in terms of being an exercise of the police power in order to bring it within "the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of. . . the Nation and of the State" and therefore federal preemption,[29] as differentiated in *National League,* 426 U.S. at 845. However, land use planning and control involves evaluating, establishing and zoning intrastate non-

[29] *See United States v. Darby,* 312 U.S. 100, 124 (1941); *Hamilton v. Kentucky Distilleries & Warehouse Co.,* 251 U.S. 146, 156 (1919).

commercial State and private activity,[30] as well as commercial activity, in order to effectuate policies (which transcend mere economics) as to the overall nature of and quality of life in local communities. Land use planning is not an area of individual business activity as differentiated in *National League.*

Most State government functions can be viewed solely as an exercise of the police power. However, *National League* demands a multi-dimensional analysis in determining sovereign functions necessary to the separate and independent existence of the States, beyond the single dimension of power source analysis—that is, labeling land use planning as merely an exercise of the police power. Otherwise, a State would be nothing more than a "gutted shell"— a capitol building with employees but without any sphere of governance except as federally dictated. A "State" is more than the location of its capitol; it also includes integral governmental functions such as fire prevention, police protection, sanitation, public health, parks and recreation, as well as hospitals and schools. These functions are established and controlled through the exercise of a State's police power. However, *National League* found that these governmental services transcend being characterized or

---

[30] No Commerce Clause case has involved even remotely similar far-reaching impacts on intrastate private and State non-commercial activity as presented by direct Federal land use planning and control [see note 27 *supra*]. Many cite *Wickard v. Filburn*, 317 U.S. 111 (1942), as allowing the Commerce Clause power to reach the personal consumption of wheat. Such is a gross distortion. A person growing wheat in his backyard only for personal consumption, no part of which was to be sold in commerce, was not subject to the Agricultural Adjustment Act [the penalties provided and the denial of a market card applied only to a farmer who sold wheat, 317 U.S. at 113-17]. However, Federal land use planning as in the case at bar prohibits wholly intrastate private and State non-commercial activity, even though a State or local community would benefit from other uses, *i.e.*, the quality of life in and the nature of local communities.

viewed merely as exercises of police power; rather, they rise to the level of being attributes of State sovereignty. So it is with land use planning and control—a hybrid of such governmental functions or services and a State's regulation of purely local non-commercial activities on its lands. Even those who would take *National League* into areas far removed from this Court's analysis acknowledge the special place of land use planning and control to the States' separate and independent existence, as well as the necessity of some sphere of State governance.[31]

The essence ("experience") of land use planning and control, which transcends being characterized solely in terms of a power source, is—the States and their local communities, by the means of land use planning and control, define and effectuate that intangible, almost indefinable, but recognizable quality of life within a given community or even a limited area within a community— including whether it will provide "open space" and limit population density,[32] whether it will grow or limit its expansion,[33] whether it will encourage industrial development (or even prohibit surface coal mining as was done by Vanderburgh County in the heart of the coal area in southwestern Indiana),[34] whether it

---

[31] Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 YALE L.J. 1196, 1232, 1266 n.235 (1977). Most authorities would agree that "Congress cannot deny the States some symbolic corollaries of independent status, some revenue with which to operate, *some sphere of autonomous law making competence* and *some measure of choice in selecting a political structure.*" L. TRIBE, AMERICAN CONSTITUTIONAL LAW 302 (1978) (emphasis added). See also *Developments in the Law — Zoning,* 91 HARV. L. REV. 1427, 1618-24 (1978).

[32] *Agins v. City of Tiburon,* ___ U.S. ___, 65 L.Ed.2d 106 (1980).

[33] *Construction Industry Association of Sonoma County v. City of Petaluma,* 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976).

[34] *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926). Vanderburgh County, Indiana, by a zoning ordinance enacted in 1976 [Vanderburgh County Ordinance Book p. 87 (1976)], (con't)

will seek to preserve historical and natural advantages,[35] whether there will be agricultural development as opposed to industrial development,[36] or even whether it will be "[a] quiet place where yards are wide, people few, and motor vehicles restricted. . . ."[37] These decisions are based upon such considerations as the location and availability of fire, water and sewage service to given areas, potential depletion of local resources, availability or lack of availability of other suitable lands, meeting the community's growth demands, avoiding "strip" communities, protecting the public health by appropriately zoning incompatible uses, providing recreational opportunities for its citizens, and providing a sufficient tax base to support local governmental services.

Furthermore, it is through land use control that many of the other integral governmental functions traditionally performed by State and local governments and recognized in *National League* are accomplished. Land use regulation is used to control development, minimize fire dangers, maximize fire fighting potential, ensure adequate sanitation facilities for the public health, and provide sufficient open

prohibits surface coal mining. Vanderburgh County is south of Pike County and adjacent to Warrick County [JA 65], the largest coal producing counties in the State [JA 83-84], and in fact, has surface mining at its borders [JA 65]. Warrick County obtains 50% of its tax revenues from the coal industry [Pl. Ex. 15-18; R. 498-503; Tr. 67-68]. The citizens of Vanderburgh County (Evansville, the largest city in southwestern Indiana, is located in Vanderburgh County, which is densely populated and highly industrialized) have decided to forego the tax revenues that they could otherwise receive from surface coal mining. However, with the advent of § 522, now the citizens of Vanderburgh County, and other similar counties, through their elected or local officials, will not be able to make such decisions. Rather, a State administrative body or the Federal Government will make such decisions.

[35] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

[36] *Goffinet v. Christian County*, 65 Ill.2d 40, 357 N.E.2d 442 (1976).

[37] *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

spaces, parks and recreational facilities.

Land use planning and control is integral to the local governmental financial structure and stability necessary to the delivery of those essential governmental services recognized in *National League*. In fact, most of the school systems throughout the States are financed directly by and their quality is dependent on real and personal property tax revenues, *e.g., San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 10 (1973). Local communities utilize land use planning concepts interrelated with property taxes to encourage or discourage various uses of property, and to enhance the financial stability of the governmental unit so as to be able to make and effectuate policy decisions in these governmental service areas. See Currier, *Exploring the Role of Taxation in the Land Use Planning Process,* 51 IND. L.J. 27 (1975). Illustrative of this are the disastrous consequences to the six southwestern Indiana counties of the federally dictated land use control and planning concepts involved in the case at bar.[38]

This essence and "experience" of land use planning and control embodies elements of Federalism as local self-determination and accountability. As recognized by this Court: "[z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of the State and local legislative authorities." *Warth v. Seldin,* 422 U.S. 490, 508 n.18 (1975). These elements of self-determination and accountability have been emphasized by this Court since the early land use cases,[39]

---

[38] See pp. 33-34 *infra* and note 6 *supra.*

[39] [T]he village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit. . . . Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial developments shall cease at its boundaries, but that the course of such developments shall proceed within definitely fixed lines. [*Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 389 (1926).]

and are essential because of the very diverse geography, geology and climate among the States which "have all but necessitated the recognition of legal distinctions corresponding to these differences," including principles of Federalism. *California v. United States,* 438 U.S. 645, 648 (1978).[40] In fact, "[p]reservation of local control, naturally enough, involves protecting the integrity of state and local governments." *City of Rome v. United States,* ___ U.S. ___, 64 L.Ed.2d 119, 155 n.12 (1980) (Powell, J., dissenting). To remove the hybrid governmental service of land use planning and control from those affected and concerned is to allow rule by those whose existence and destiny and, therefore, perspective is totally removed from the consequences without accountability to those affected. It would cut to the core of principles of Federalism.

Land use control and planning is in fact a State's use of its land based on a quasi-property interest which is a part of the "States as States." Land within a State's boundaries is a part of the State and, accordingly, the State's relationship to its lands has been accorded special treatment.[41] More important, land within a State's boundaries is subject to public or State use in the form of a servitude by which the State can restrict the owner's right to use the property for the benefit of the State and its citizens without a "taking" occurring, in part because of the presumed local benefit-burden resulting from land use planning and control.[42] For the Federal Government to regulate this State use of land and its property interest is to regulate the "States as States."

---

[40] Indeed, Congress recognized this very aspect in § 101(f) of the Act, except that in the instance of land use planning and control, Congress ignored it.

[41] "It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders." *Kansas v. Colorado,* 206 U.S. 46, 93 (1907).

[42] See *Agins v. City of Tiburon,* ___ U.S. ___, 65 L.Ed.2d 106, 113 (1980); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 134-35 (1978).

Equally as important in the balancing of land use planning and control within the constitutional framework and principles of Federalism is the Fifth Amendment protection afforded property rights which cannot be "taken for public use, without just compensation." It is the existence of a public benefit in which the landowner shares, or to use Chief Justice Holmes' phrase, there is "an average reciprocity of advantage," which in part justifies placing burdens upon the use of the land without compensation being required.[43] This local benefit-burden emphasizes the elements of self-determination and accountability within Federalism concepts. To allow the Federal Government under the Commerce Clause to dictate land use control and planning concepts based on "substantial and adverse effects" on commerce would either remove totally or so dilute the local benefit to landowners and leave only the burden, as to impinge directly upon Fifth Amendment rights.

This hybrid governmental service of land use planning and control through a State's use of its lands for the benefit of its citizens in today's urbanized society is one of the most essential attributes of sovereignty possessed by the State of Indiana and its political subdivisions and is protected by the Constitution.

(B) The Act Coerces The States. Quite to the contrary of the Secretary's assertions that the Act only "encourages"

---

[43] *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922) (where there was no such reciprocity). See also note 42 *supra.* If the benefit to the public generally is clear and distinct, land use regulations have been upheld despite severe financial impact on the landowner's property. *See Penn Central Transportation Co., supra,* where the Court divided over whether the "average reciprocity of advantage" to the landowner was sufficient to justify the extent of the restriction in upholding the New York law. The majority opinion found sufficient benefit enuring to the City generally and to the landowners as a part of that City [438 U.S. at 134-35].

and does not "require" the States "to enforce the Act" [Va. Br. 31], the challenged provisions operate directly on the States through §§ 503 and 504 to compel the States by threatened Federal usurpation not merely to enforce the Act, but to exercise their legislative and executive powers as dictated by Congress.[44] This "choice" is not a "carrot and stick" inducement enacted pursuant to the spending power [Art. I, § 8, cl. 1], the propriety of which was specifically left open in *National League of Cities,* 426 U.S. at 852 n.17. In these situations the States may choose not to enact laws on pain of not receiving Federal funds,[45] which is far different than the "stick" being Federal usurpation, as in the case at bar. Since the Federal Government has no power to directly impose these land use policies as under the prime farmland provisions or to assume the role as decision-maker under the procedure for zoning lands unsuitable for surface coal mining [§ 522] and other challenged provisions, that a State "chooses" to adopt these provisions in a State Program to avoid Federal usurpation is irrelevant. To state that such is a "choice" is a perversion of the word, and the General Assembly of Indiana so found [see note 3 *supra* and Appendix C *infra*].

These propositions flow directly from *National League of Cities,* where the Federal Government did not directly mandate or control State policies in the areas of fire protection, police protection, sanitation, parks, recreation, schools and hospitals. Yet the *indirect* infringement (by wage mandates) on State policies concerning these governmental services traditionally delivered by the States was held to be contrary to the Tenth Amendment and other Federalism concepts implicit in the Constitution. Had the

---

[44] See notes 2 & 3 *supra;* Part I (A) *supra.*

[45] *E.g., Texas Landowners Rights Ass'n v. Harris,* 453 F. Supp. 1025 (D.D.C. 1978), *aff'd,* 598 F.2d 311 (D.C. Cir.), *cert. denied,* 444 U.S. 927 (1979); *North Carolina v. Califano,* 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd,* 435 U.S. 962 (1978).

Federal Government directly usurped the State governmental services, or directly mandated that the States perform these governmental services pursuant to dictated policies by threatened usurpation, there can be no doubt that the transgression of Tenth Amendment and Federalism concepts would have been even more severe.

This is also required by *Charles C. Steward Machine Co. v. Davis,* 301 U.S. 548 (1936), since Federal statutes are void "as involving the coercion of States in contravention of the Tenth Amendment", if two propositions are "made out by the assailant":

> There must be a showing in the first place that separated from the credit [as applicable to the case at bar, the required State Program] the revenue provisions [as applicable to the case at bar, a Federal Program directly usurping the State functions] are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are *weapons of coercion, destroying or impairing the autonomy* of the States. [301 U.S. at 586; emphasis added.]

In the case at bar, as to the first "showing," the Federal Government cannot do the latter; consequently, the former is equally unlawful. The second "showing" (weapons of coercion) is a *per se* result of the first.

(C) **The State Interests Are Paramount To The Federal Interests.** Appellees do not contend that being an integral function of State and local governments makes land use planning and regulation totally immune from Federal control under all circumstances. Exigencies of national scope may demand broad, swift action that may impinge on State sovereignty [*National League,* 426 U.S. at 853, 856 (Blackmun, J., concurring)]. But this is neither the normal course, nor the situation at hand. Whether the Act's interference with this sovereignty is justified must turn on the factors set out in *National League,* which show that it is not.

The pollution control aspects of the Act were not challenged by appellees and remain intact. Thus, there are no interstate spill-over effects. Preservation of prime farmland in no way presents the pressing need of the wage freeze sustained in *Fry v. United States,* 421 U.S. 542 (1975). There is currently, and for the foreseeable future, no shortage of farmland. In fact, the Federal Government is paying to withhold vastly larger quantities of farmland from production than are affected each year by surface mining [see pp. 42-45 *infra*].

Unlike *Fry,* the challenged provisions were not carefully drafted to limit their interference with State sovereignty—in fact, they were drafted in perhaps the most intrusive manner possible. Other less intrusive and undoubtedly equally effective means of encouraging preservation of farmlands are available to the Federal Government, such as tax credits or penalties, adoption of policies relating to federally guaranteed or insured loans, or even prime farmland prohibitions in federal water, highway and other projects. The means here, however, make no pretense of being discrete. They dictate governmental structures, procedures and criteria for land use decisions and, in fact, some dictate specific land use.

If nothing else, Indiana could have been given the discretion to allow variances for other land uses in the case of the AOC and prime farmland provisions. In Indiana, no variances based on facilitating higher or better land uses was provided in the prime farmland, AOC and topsoil provisions, as were provided for mountaintops and steep slopes in the East. If Indiana refuses to enact laws and promulgate regulations as the Federal Government has dictated, the Federal Government will do so. There are no options, no alternatives, and no exceptions.

Contrary to the Secretary's assertions, this intrusion into State affairs is permanent and final. The challenged

provisions are not temporary measures as in *Fry*. Governmental structures and procedures for postmining land use, as well as actual land use are dictated, presumably forever, regardless of any need or change in circumstances facing the States and local governments.

While the prime farmland mandate is imposed upon a piece of property for more than a decade, the effect of the regulation undoubtedly will be beyond that. Everyone agrees that surface mining presents an ideal opportunity for a change in land use. However, after ten years and restoration of the surface to its prior condition and contour, the land may no longer be suited for a change in use. The opportune time to effectuate a change in land use will have passed, in some cases forever. The means or energy for conversion of the land will not be available ten years after the fact. In the meantime, other non-mined prime farmland may be converted to the uses for which mined prime farmlands could have been utilized.

The possible effects of the interference are evident. A community might well be in need of housing, recreational or water supply facilities for which the mined land would be ideally suited. On the other hand, such mined land may be best adaptable in a given community for specific municipal purposes, such as an airport or waste treatment facility. Nevertheless, such uses are forbidden.

The most drastic effects of these federally dictated land use policies on Indiana land use planning, even without regard to the federally dictated governmental structures and procedures, are that prime farmland as defined by the Secretary of Agriculture is not prime farmland based on Indiana's land use policies; that the highest and best postmining land use of prime farmland under Indiana land use concepts is not necessarily a farming use [see note 6 *supra*]; that surface coal mining land use is integrally related to the county government financial well-being in

southwestern Indiana to the extent that 50% of one county's total real and personal property tax revenue is derived from the land use of surface coal mining [Pl. Ex. 15-19; R. 498-503; Tr. 67-68]; and that the fulfillment of the energy needs of Indiana citizens is integrally related to the land use of surface coal mining [83% of the Indiana surface mined coal is purchased by Indiana utilities under long-term coal contracts, JA 72]. The result of the federally dictated land use policies will be to displace the surface coal mining land use in Indiana into underground coal mining land uses in Kentucky and Illinois.[46] The land use structures and benefits in Indiana noted above will be destroyed.

As in *National League of Cities,* the consequences of the Federal intrusion on this attribute of State sovereignty are in fact disastrous to the separate and independent existence of Indiana. The folly of Federal land use planning based on the myopic view of some is apparent.

III. THE CHALLENGED PROVISIONS EXCEED CONGRESS' POWER UNDER THE COMMERCE AND NECESSARY AND PROPER CLAUSES

The Secretary's argument on the Commerce Clause issues subtly changes constitutional precepts. Surface mining, like manufacturing, "is not of itself interstate commerce. . . ." *United States v. Darby,* 312 U.S. 100, 113 (1940). For such

---

[46] [JA 148-52.] This land use policy was based on the nature and extent of coal reserves, as well as the relationship of such reserves to prime farmland, in Illinois. Indiana's coal reserves are not the same and for the most part are not mineable by the underground method [JA 77-80]. See note 6 *supra.*

The southwestern Indiana counties are heavily dependent on the land use of surface coal mining as a source of tax revenues and employment. The coal industry, in turn, draws other industry that provides additional employment and tax revenues, which would not locate there were it not for the coal industry. [See JA 76.]

intrastate activity to be subject to regulation under the Commerce Clause in conjunction with the Necessary and Proper Clause, the regulated facet of surface mining must have a "substantial and harmful" effect on interstate commerce,[47] not merely as the Secretary contends, that it must have only "some" effect on commerce, "be it great or small."[48] Indeed, this Court has recognized that Congress may not use "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."[49]

The function of a court on a constitutional challenge is to determine whether Congress had a "rational basis" for finding that there was a substantial adverse effect on interstate commerce from each particular facet of the intrastate activity being regulated.

---

[47] *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258, 272 (1964); *Katzenbach v. McClung,* 379 U.S. 294, 304 (1964); *Wickard v. Filburn,* 317 U.S. 111, 125 (1942).

[48] See Ind. Br. 11, 14. As to the Secretary's reliance on *NLRB v. Fainblatt,* 306 U.S. 601, 606 (1939), to support his challenge of the District Court's methodology of measuring qualitatively and quantitatively this effect based on the information before Congress, *Fainblatt* is merely exemplative of the class of activities test enunciated in *Wickard v. Filburn,* 317 U.S. 111, 127-28 (1942), where in citing to *Fainblatt* the Court noted that a single farmer's contribution "taken together with that of many others similarly situated, is far from trivial." This Court has always required that there be a "substantial" and "adverse" or harmful (not "trivial") impact on interstate commerce to support the regulation of intrastate activities. *Heart of Atlanta Motel, Inc., supra; Katzenbach, supra; Wickard, supra; Wirtz, supra.* Almost every decision of this Court in determining the prerequisite substantial and adverse effect on interstate commerce has considered "qualitative" as well as "quantative" effects on interstate commerce. *See Heart of Atlanta Motel, Inc. v. United States, supra* at 253; *Perez v. United States,* 402 U.S. 146, 155-157 (1971). A quantitative judgment must be made by a court in exercising judicial review of whether Congress' exercise of power was within constitutional limits.

[49] *Maryland v. Wirtz,* 392 U.S. 183, 196 n.27 (1968), *overruled on other grounds, National League of Cities v. Usery,* 426 U.S. 833 (1976).

Katzenbach v. McClung, 379 U.S. 294 (1964). The judicial focus is on "whether the *particular activity* regulated or prohibited is within the reach of the federal power." *Darby, supra* at 120-21 (emphasis added).

Even if a rational basis is found, the inquiry is not complete. The focus under the Necessary and Proper Clause is whether the "means chosen" [the challenged provision of the Act] are "plainly adapted to the legitimate end" of alleviating an adverse effect on interstate commerce from the particular facet or activity regulated,[50] *i.e.,* a means/ends nexus test, not as the Secretary contends whether the means are "reasonable and rational" in the abstract [Va. Br. 24].

The Secretary contends that there are three independent bases under the Commerce Clause for the validity of the challenged provisions. Initially the Secretary asserts that since coal is a commodity sold in interstate commerce, Congress may regulate the "conditions under which that commodity is produced" [Ind. Br. 12, citing *Darby, supra*]. *Darby* did not hold that intrastate activities can be regulated absent a substantial adverse effect on commerce. *Darby* held that a provision of the Fair Labor Standards Act which prohibited the "shipment" in interstate commerce of goods produced under substandard labor wages was valid because "the shipment of manufactured goods interstate is such commerce" [312 U.S. at 113]. This is in no way analogous to

---

[50] *Heart of Atlanta Motel, Inc. v. United States, supra; Katzenbach v. McClung, supra; M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819). The fact that other, collateral results may be attained will not invalidate the regulation if, *and only if,* the regulation is otherwise valid, that is, adapted to removing the rationally found substantial adverse effect on interstate commerce. *See Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 163 (1942). Congress may not, "'under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government.'" *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 326 (1936), quoting *M'Culloch v. Maryland,* 17 U.S. at 423.

the challenged provisions of the Act in question since they go beyond controlling the use of instrumentalities of interstate commerce. Rather, in the case at bar this Court must review the challenged provisions under the substantial adverse effect test, as the Court did in *Darby* in reviewing the other challenged Fair Labor Standards Act provisions [312 U.S. at 119-20].

To the extent that the Secretary is relying [Ind. Br. 20] on the holding of *Darby* concerning industry's use of substandard labor conditions to gain a competitive advantage and cause "impairment or destruction" of competing local industry,[51] Congress had no rational basis for an analogous finding as to competition through reclamation cost variances because the coal industry in the

[51] Congress did not find in § 101(g) that there was a substantial adverse effect on interstate commerce by the impairment or destruction of competing coal companies in States with the most rigorous reclamation standards. Rather Congress found that such competition might "undermine the ability of the several States to. . . maintain adequate standards. . . ." This is not a substantial adverse effect on commerce, and it is not within *Darby*. The ability of a State to regulate is a governmental effect, not a commercial effect. The argument that unless all States have the same regulations of any industrial activity, then there is an adverse effect on commerce, would lay open the regulation of all local industry to Federal regulation, *i.e.*, the regulation of State regulators. Various systems of State taxation are for the specific purpose of attracting industry or land use planning. Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 IND. L.J. 27 (1975). Extending *Darby* to hold that the use of these benefits is unfair competition would undermine the ability of States to regulate or tax, and would require uniform taxation and regulation by States.

Also, the Record belies such a finding. Pennsylvania and Ohio had stringent laws and a flourishing coal industry. Their ability to regulate was not impaired. See note 52 *infra*. Illinois also had stringent reclamation requirements, but several Senators did not want State "bureaucrats" to be able to allow farming use to change (which had nothing to do with the State's ability to regulate). Indiana had excellent reclamation laws without any pollution problems [JA 102-04], but did not have the prime farmland conflict present in Illinois [note 6 *supra*; Appendix C]. In other words, differing local conditions gave rise to differing State laws. See note 34 *supra*.

States with the most rigorous reclamation regulations was flourishing.[52]

More important, in *Darby* the Court found a rational basis to support the conclusion that the use of substandard labor costs resulted in the "destruction of local businesses" through competition. This is not analogous to varying reclamation costs in coal production. Coal is not a homogeneous commodity, nor is there any uniformity in production and reclamation conditions which could support such an assumption. In fact, costs of producing, reclaiming and transporting surface mined coal are site-specific and vary based upon the extremely diverse geological formations and nature of the coal and its location in relation to that of its users. Topsoil can vary throughout the United States from but a few inches to a few feet and overburden can vary from ten feet to over one hundred feet with coal seams ranging from a few feet thick to ninety feet thick, even within the same State, just as the slope of the terrain can similarly vary. Hence, the overburden to coal ratio can vary from 10':1' to 1':10', as can the coal recovery (tons) per acre ratio. The nature of the coal can be anthracite, bituminous, subbituminous or lignite with widely varying ash, moisture, fixed carbon and sulfur content, as well as heat producing

---

[52] See *House Hearings on H.R. 2*, Part II 44-49, where Governor Shapp of Pennsylvania stated: "[E]ven though with tough State regulations, Pennsylvania's coal production is up and constantly rising. The number of coal mining jobs in Pennsylvania is increasing and so are the profits of coal mining companies in our State. . . . Our law has not hampered production, stifled profits, or cost jobs." [*Id.* at 44.] In fact, any differential cost was stated to be "a very slight one" [*Id.* at 49]. Similarly, Rep. Murphy of Pennsylvania stated, "But today strip mining in Pennsylvania is regulated, yet it is more profitable than ever, and coal is more plentiful than ever." [123 CONG. REC. 24426 (1977).] Also in Ohio, Rep. Regula noted that after Ohio enacted a stringent reclamation act, Ohio continued to "have increased mining." [123 CONG. REC. 24427 (1977).]

capacity [from 7,255 BTU/ton to 14,715 BTU/ton].[53] Necessarily, the reclamation costs per acre, ton or BTU similarly range. Hence, the final cost of production and reclamation per BTU will vary from mine site to mine site within a State and between States.

In fact, it is commonly accepted that a competitive coal market is far less than even a regional market.[54] The transportation costs [averaging 20% of the per ton cost, *Use of Coal, supra* note 53, at 85] inhibit selling coal over great distances [83% of Indiana coal is sold to Indiana utilities under long-term contracts, JA 72-75]. Furthermore, most coal is not sold on a "spot market." Nationally, the electric utility industry consumes over two-thirds of the coal produced, of which in 1977, 86% was sold under long-term coal contracts, most in excess of twenty years [*Use of Coal, supra* note 53, at 84]. Moreover, in 1977, 14.5% of the utility consumption was from their captive coal companies, which is projected to increase to 18.8% in 1985 [*Use of Coal, supra*

---

[53] Office of Technology Assessment, Congress of the United States, *The Direct Use of Coal — Prospects and Problems of Production and Combustion* 57, 85 (1979) (hereinafter *"Use of Coal"*).

[54] The national concentration ratio understates meaningful concentration because coal does not have a national market. When coal production is divided into four regional markets, the concentration ratio for the top-four producers in 1977 were: Appalachia, 22.3 percent; Midwest, 65.1 percent; northern Plains, 37.7 percent, and Southwest 64.1 percent. West of the Appalachian fields, moderate to high concentration exists. Even regional markets can be deceptively large. For example, a single Appalachian market does not really exist— northern Appalachian coal is not sold in southern Appalachian markets; east Kentucky coal does not sell in the Northeast. Further, high-grade metallurgical coals do not compete against steam coals. Captive coal, moreover, does not generally compete against noncaptive coal. Similarly, 1977's 54 million tons of export coal— most of which was metallurgical— does not compete domestically, except when foreign demand slumps. A true assessment of concentration in the coal industry must disaggregate production data and look at concentration in much more precisely defined markets. [*Use of Coal, supra* note 53, at 117-18.]

note 53, at 112]. The long-term coal contracts are necessitated by the huge capital outlays necessary to open new mines which in turn require a life-of-the-mine purchaser. This capital outlay also contributes to the fact that 69% of the planned new capacity of coal production is attributable to but seven large companies [*Use of Coal, supra* note 53, at 118]. Moreover, boilers and furnaces are designed to burn specific coal and are not readily adaptable to even coal of the same type [*Use of Coal, supra* note 53, at 58]. Other user-oriented problems are presented by ambient air quality standards, new source performance standards and prevention of significant deterioration of air quality [which now encompass particulate matter, SO_2, NO_2, CO, hydrocarbons, and photochemical oxidants] under the various Federal air pollution acts and regulations. [*Use of Coal, supra* note 53, at 58, 161-80.]

All of the above factors severely restrict applying normal competition factors as supply, demand, and cost to the coal industry. Hence, establishing a minimum wage so as to level competitive advantages based on varying labor costs cannot be translated to surface coal mining competition and reclamation costs. To make such an assertion as the Secretary does, is to attempt a simplistic, glib, superficial, and wholly misplaced analogy. It provides no basis for the constitutionality of the sections challenged.[55]

The second rationale by which the Secretary seeks to justify the challenged provisions of the Act is by the generalized assertion that coal mining operations significantly and adversely affect "commerce in agricultural products and other commodities" and that the challenged provisions are a means reasonably and plainly adapted to

---

[55] There is no conceivable way these contentions support the areas unsuitable provisions [§ 522] or the requirement of pre-permitting approval of postmining land use changes.

removing such substantial and adverse effects.[56] Presumably the Secretary is referring to the finding that surface mining operations adversely affect commerce "by destroying or *diminishing the utility of land* for commercial, industrial, residential, recreational, agricultural, and forestry purposes. . ." [§ 101(c) (emphasis added)]. But he fails to articulate the nature of the burden on interstate commerce that is being alleviated other than general references to the preservation of productive capacity or utility, and, instead, urges blind deference to Congress' rhetoric. Apparently the judgment is that if land is surface mined, the land use or utilization of the land may be changed, not that the affected lands would have no postmining utility. There was no rational basis for Congress to believe that surface mining in 1977, or for several years prior thereto, resulted in the destruction of the utility of surface mined land. Of the 28 States producing coal in 1976, all had laws requiring restoration of surface mined land to a productive utility.[57] The specific sections challenged were only enacted because Congress made a land use judgment that certain utilities of land are equal or better than others, and, therefore, dictated specific non-variable land use provisions. The prime farmland, AOC and topsoil provisions implement specific, non-variable Federal judgments on what is the best use of land. In order to be a "means reasonably and plainly adapted" to alleviating a substantial adverse effect on commerce, there must be a rational basis to

---

[56] Again the Secretary is presumably making a generalized contention to support each of the challenged provisions. However, again it is inconceivable to apply those contentions to support the areas unsuitable provisions [§ 522].

[57] All State laws required backfilling, grading, and revegetation long before the Act. See *House Hearings on H.R. 2*, Part IV 262-372; H.R. REP. No. 95-218, 95th Cong., lst Sess. 76 (1977); Appendix C hereto; *Final Environmental Statement, Permanent Regulatory Program Implementing Section 501(b)*, U.S. Dept. of the Interior, OSM-EIS-1 pp. BII-17 through BII-29 (1979).

support that a specific change in land use results in such an effect on commerce. Congress had no rational basis for determining that a change in use to or from forestry, or agriculture, or industry, or recreation, or commercial uses as opposed to each other, has a substantial adverse effect on interstate commerce.

The only instance where the Secretary contends a specific change in a postmining land use would have a substantial and adverse effect on interstate commerce is in the prime farmland provisions,[58] where the Secretary asserts that the District Court limited its review to a single set of statistics set forth in the *Report Of The Interagency Task Force On The Issue Of A Moratorium Or A Ban On Mining In Prime Agricultural Lands* (1977) [hereinafter "Task Force Report"], which was submitted to the House Committee on Interior and Insular Affairs [JA 51-64]. Not only was it the only information before Congress, it was the only information available.[59] No matter how the Secretary

---

[58] Apparently the Secretary, recognizing the weakness of his position on prime farmland, has decided to subtly change the required substantial adverse effect test. [See note 48 *supra.*] While the Secretary also asserts generally that the prime farmland provisions are a means to eliminate erosion, landslides, floods, and water pollution, such an assertion is absurd. See discussion pp. 7-10 *supra.*

[59] This is made clear by the history of the Act before the Senate. Originally as passed by the Senate, the Act contained a moritorium on mining on prime farmland [§ 410(d)], and in view of the lack of information concerning the effect on agriculture of mining on prime farmland by § 410(d)(4), the Secretary of Agriculture was directed to "commence such research, experimentation, and studies as are necessary to determine the impact of surface mining operations on agricultural production. . . ." [123 CONG. REC. 15787 (1977).] If there was any other information available, the Senate would not have required the investigation by the Secretary of Agriculture. When the Senate discovered the Task Force Report, the required studies provision was dropped in the Committee of Conference. [H.R. REP. (CONF. REP.) No. 95-493, 95th Cong., 1st Sess. 105 (1977).]

Also the prime farmland provisions were not involved in the Secretary's description of Congress' "painstaking review of the available data gathered. . . during several years of intense

(con't)

Secretary twists, limits and contorts the history of the Act on prime farmland, it remains that the Task Force Report was the only means by which Congress could form a judgment as to the nature of any impact, and the House Committee through the House Report concluded[60] that the "data" demonstrated an insufficient or trivial impact on interstate commerce from the effect of surface coal mining on prime farmland, and rightfully so.[61]

---

legislative endeavor." [Ind. Br. 13.] The prime farmland provisions were not in any of the previously proposed legislation and, in fact, in the 95th Congress, the majority of the prime farmland provisions were not in the proposed House or Senate bill. Hence, the Secretary's assertions as to the timing of the Task Force Report versus the hearings and the Report of the House Committee as being at the tail end of "several years of intensive legislative endeavor" [Ind. Br. 13] is not true.

[60] "Furthermore, data contained in the Report of the Interagency Task Force on the Issue of a Moritorium or Ban on Mining in Prime Agricultural Lands appears to confirm the view that a moritorium is not justified." [H.R. REP. No. 95-218, 95th Cong., lst Sess. 185 (1977)].

[61] The Task Force Report included the results of a 1975 study conducted by the Soil Conservation Service which found that the Nation contains a total of 384,000,000 acres of prime farmland of which 65% was used for crop land with approximately 134,000,000 acres of prime farmland not in crop land use [JA 53-55]. Further studies were conducted based on the annual production of coal which demonstrated that only 21,800 acres of prime farmland are disturbed by surface mining each year, which constitutes only 0.006% of the total prime farmland in the United States [JA 61]. Thus, it would take 166 years for surface mining to disturb even 1% of the total prime farmland in the Nation. The Report concluded that even if all prime farmland affected by surface mining in 1977 came entirely out of corn production, the annual effect based on the 1976/77 crop year would have been less than 0.04 percent [JA 62]. This is based on a class of activities analysis not just upon the effect in Indiana.

What the Secretary would consider irrelevant, most would consider irrational, as should this Court, that is— at the same time, the Federal Government through the Agricultural Stabilization and Conservation Service is paying farmers *not* to grow crops on 5,900,000 acres, which is 200 times the amount of prime farmland disturbed annually by surface coal mining. [JA 95-97.] Clearly, such a *de minimis* effect is not a substantial adverse effect as required by this Court, but is a trivial impact which is not sufficient.

The Secretary alludes to the fact that the Task Force Report indicated "that the total prime farmland acreage that might be affected by surface coal mining is approximately 7,000,000 acres" [Ind. Br. 15]. That figure was merely the extent of prime farmland overlying surface mineable coal, and it would take in excess of 300 years to affect the 7,000,000 acres of prime farmland. Finally, the Secretary alludes to hearing testimony of a zoning administrator of Knox County, Illinois, who supposedly "graphically described the losses in agricultural productivity . . . in his county." [*Id.*] However, try as one might, even the most vivid imagination cannot put together anything from Mr. Masterson's testimony concerning one county in one State [which is not true in Indiana, see note 6 *supra*] to counter the trivial impact on interstate commerce demonstrated by the Task Force Report.

The Secretary also cites to the remarks of Senators Humphrey and Stevenson. These remarks are but personal opinions which were later disproved by the "data" in the Task Force Report [see note 62 *infra*]. Moreover, the Senators' interest was not as to a substantial adverse effect on interstate commerce, but was directed to displeasure with the land use planning policies being exercised by administrators in the State of Illinois which already had a rigorous reclamation act.[62] Further, the misguided national land use policy for all the States, in turn, was based on the assumption by some that since Illinois had sufficient underground mineable reserves so that a land use policy giving preferential treatment to underground mining and agricultural uses as opposed to surface mining use was valid,

---

[62] See the remarks of Senator Stevenson, note 8 *supra*. Again, this is a land use concept, but neither Senator was speaking about land use conversion as being a substantial adverse impact on agricultural production.

and that such was the case in all other States.[63]

The naked citations to the Congressional Record, while on their face impressive, once read do nothing to detract from the Task Force Report's conclusion as to the trivial impact on interstate commerce. The prime farmland provisions cannot pass the requisite constitutional tests under the Commerce Clause and Necessary and Proper Clause.

The third basis the Secretary asserts to support the challenged provisions is that they prevent environmental harm and protect life and property. With respect to the AOC provision, the Secretary contends that it is designed "to avoid continuing harm" caused by "unreclaimed mining cuts." But since all coal mining States required reclamation, there was no rational basis for Congress to believe that such was the situation in 1977 or had been for years prior thereto.[64]

---

[63] The Task Force Report indicated that the prime farmland provisions were in fact based on two studies done in Illinois which reached the conclusion that since the deep mineable reserves in Illinois are more than plentiful, there was no need to surface mine coal. [See JA 52.] Of course, this conclusion for land use policies in other States is unsupportable and disastrous. See notes 6 & 46 *supra.*

[64] See note 57 *supra.* The Secretary's citation [Ind. Br. 18 n.11] is not to the contrary. The 1.9 million acres of unreclaimed land referenced in *House Hearings on H.R. 2,* Part II 69, was to land which had not been reclaimed both by surface coal mining and other types of mineral surface mining *in the past,* that is, prior to the State acts. The representative of the Corps of Engineers was not referring to such occurring under present State laws and regulations. [*See id.* at 77, 82, 85, 91.] In further support of the above statement the Secretary also references S. REP. No. 95-128, 95th Cong., lst Sess. 60, 83 (1977), and H.R. REP. No. 95-218, 95th Cong., lst Sess. 78, 80, 93 (1977). A reading of these reports indicates that all of the original contour problems were with reference to the steep slope and mountaintop areas of the eastern United States. For instance, the House Report cited states:

> In the humid East, retention of overburden material on the bench, avoiding all unnecessary placement of the unconsolidated material on steep slopes would contribute most significantly to the elimination of slides, sedimentation

(con't)

The Secretary also argues that the AOC and the topsoil provisions are necessary to prevent water pollution [Ind. Br. 18 n.11] by preventing erosion and sedimentation. Obviously, the cited comment of the U.S. Army Corps of Engineers relates only to topsoil, not to AOC. As to topsoil and erosion, the Act contains specific requirements for preventing erosion which require the operator to control erosion and sedimentation until the bond is released.[65] In other words, the Act contains independent requirements controlling the goal the Secretary asserts for the topsoil requirement, making it clear that the topsoil requirement is not directed at water pollution control.

With respect to the pre-permit approval of postmining land uses, the Secretary seems to contend that this requirement is necessary to ensure that the operator has the "technological capability to restore the land." How this is

---

siltation and other offsite effects which threatened downstream areas. The basic concept embodying this principle is returning the mining site to its approximate original contour.

Approximate original contour is equally valid when applied to midwestern and western coal surface mining, inasmuch as the concept also includes the idea of blending the site into the surrounding terrain to the greatest degree possible. . . . [H.R. REP. No. 95-218 at 80.]

These concepts have no applicability to the Midwest—for instance, Indiana has no steep slopes and did not have a pollution problem [see Appendix C hereto]. Where the reason for the AOC provision is based on problems not present in Indiana, and yet the AOC is even more rigid in Indiana, it cannot be said that the AOC as applicable in Indiana is plainly adapted to removing the problems which did not even exist in Indiana.

[65] For instance, in § 515(b)(10) operators are required to control "quality and quantity of water. . . during reclamation" including preventing "additional contributions of suspended solids to streamflow, or runoff outside the permit area" [(B)(i)], and to construct siltation structures [(B)(ii)]. Furthermore, pursuant to § 515(b)(19), revegetation is independently required and pursuant to § 519(c)(2) the bond cannot be released if the surface mined lands are "contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by Section 515(b)(10) . . . ."

related to the requirement that any changes in postmining land use must be approved by the regulatory authority is difficult to comprehend. Again, the relevance of a change in a particular land use to any adverse effect on interstate commerce is nonexistent.[66]

It remains that the challenged provisions are not means reasonably and plainly adapted to removing significant adverse effects on interstate commerce and, therefore, are beyond the Commerce Clause power.

IV. THE PRIME FARMLAND AND AOC PROVISIONS VIOLATE THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE FIFTH AMENDMENT

The substantive due process issue raised by the AOC and prime farmland requirements is two-fold: Whether the

---

[66] The Secretary argues that § 522(e)(4) and (5) is reasonably and plainly adapted to "ensuring that the extraction of coal does not endanger life and property" (emphasis added). But it is not so limited. By the broad definition of "surface coal mining operations," innocuous activity as storage facilities or parking of vehicles is prohibited. There was no evidence before Congress that persons or property were endangered by activities as driving or parking of vehicles, or the loading of coal or supplies. Section 522(e) is not reasonably and plainly adapted to removing the burden on interstate commerce from any dangers to life or property from surface coal mining operations.

As to § 522(a), (c) and (d), the Secretary makes absolutely no analysis of how zoning an area unsuitable for mining purposes is based upon such an end. This Court should, in an equally cursory manner, dismiss such a contention. The requirements of § 522(a)(3) whereby States must establish procedures that allow lands to be zoned unsuitable for surface mining if damage might result to "historic, cultural [or] esthetic values" is so unrelated to interstate commerce that no more need be said.

discriminatory treatment[67] of mine operators and States in the Midwest violates the equal protection aspects of the Fifth Amendment;[68] and second, whether the foregoing provisions are arbitrary and capricious in violation of the due process guarantees of the Fifth Amendment.[69]

As to the equal protection aspects, the Secretary quarrels with the standard of review invoked by the District Court, set forth in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 103 (1976)—that the discrimination must be justified by an overriding national interest. The Secretary argues that the appropriate standard of review is that the discriminatory treatment must merely be rationally related to a legitimate purpose [Ind. Br. 28]. However, the only possible legitimate purpose for the discriminatory treatment in the case at bar is the alleviation of substantial adverse effects on interstate commerce. If this is not an overriding national interest, then the effect cannot be substantial and adverse. Hence, the Secretary's differentiation under close analysis is a distinction without any basis.

The Secretary seeks to hide behind a "presumption of rationality" which there may be in other areas. However, when regulation of intrastate activities under the Commerce Clause power is at stake, there is no such presumption. The means must be reasonably and plainly adapted to the

---

[67] The discrimination in the case at bar is not that Congress failed to exercise its powers as to an entire class or field of activities, *e.g., Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 184 (1945), which contention the Iowa and Virginia cases concern.

[68] *See Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

[69] *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

legitimate end of removing substantial adverse effects on interstate commerce, and this is not resolved by any presumption or by blind deference to Congress. *Heart of Atlanta Motel, supra* at 262, 271, 273.

At the core of the discriminatory treatment between Indiana and Appalachia is land use. In the latter area, a variance from the AOC requirement is provided where the AOC requirement is not necessary to and will not facilitate a particular proposed postmining land use. In Indiana, no variance from the AOC and prime farmland requirements is allowed, even where such requirements are not necessary to and will not facilitate or allow other land uses. In the situation of prime farmland, the prime farmland and AOC requirements were specifically designed to require a farming use. The only legitimate rationale for denying variances in Indiana from the AOC and prime farmland requirements would be that they are necessary to the achievement of a specific postmining land use and that any change in the postmining land use which might result from such variances would create a substantial adverse effect on interstate commerce.[70] But the only effect on commerce which the Secretary has even argued relates to a change in land use on prime farmland. However, a change in the land use of prime farmland to other uses has no substantial and adverse effect on commerce.

In other words, it could well be that prime farmland would have a greater productive capacity or utility given local needs and conditions if it were returned to a rolling topography with lakes and used for residential, commercial, or forestry purposes. However, this change in land use or utility which is being prevented does not have a significant and adverse effect on interstate commerce. At the same

---

[70] As previously demonstrated, the AOC requirement and the prime farmland requirements in Indiana do not serve any other legitimate interest, i.e., water pollution control. See pp. 7-10; 45-46 *supra*.

time, the AOC requirement as applied in Appalachia can be varied where it is unnecessary and a variance will facilitate an "equal or better economic or public use" as compared with premining use [§ 515(c)(3)(A), (e)(3)(A)]. Hence, the nonvariable prime farmland and AOC requirements on prime farmland are designed to allow only farming and preclude other land uses without a legitimate basis.

A change in land use to other than a farming use on non-prime farmland has never been argued by the Secretary to have an effect on interstate commerce, nor is there any rational basis to support such a contention. However, in Indiana the AOC requirement is nonvariable as to non-prime farmland. For instance, if a rolling topography is present prior to mining, or any topography less than a 20° slope, the land must be returned to a rolling topography, even though such topography might not be suited for an equal or better economic or public use, as an airport, farming or the like. Yet, as to steep slopes and mountaintops in Appalachia, a variance is allowed from the AOC requirement based on a proposed equal or higher economic or public postmining land use. This disparate treatment cannot be justified based upon the alleviation of substantial adverse effects on interstate commerce.

The Secretary has also argued that the prime farmland provisions do not require a postmining land use of farming. Even if this is so (which it is clearly not, see notes 7 & 8 *supra),* the discriminatory treatment still remains both as to prime farmland and non-prime farmland in that the operators and States in Appalachia are allowed to vary the AOC requirement where such is not necessary and a variance will facilitate a postmining land use. However, the same treatment is not allowed Indiana and the operators in Indiana as to the AOC and prime farmland requirements.

Moreover, in Indiana, where the AOC and prime farmland requirements are unnecessary to a proposed postmining land use, or, practically speaking, prohibit a

specific postmining land use, these requirements result in economic waste and are irrational. Hence, discrimination by variances based on postmining land uses for Appalachia while denying such variances based on land uses in Indiana becomes unsupportable by any rationale. Therefore, the AOC and prime farmland provisions as applied in Indiana are contrary to the equal protection and substantive due process requirements of the Fifth Amendment.

V. THE CHALLENGED PROVISIONS TAKE PROPERTY WITHOUT JUST COMPENSATION

The Secretary attempts to divert the Court's attention from the fact that the prime farmland provisions and § 522, by precluding surface mining, effect a taking of appellee coal companies' mineral interests in land to which they do not necessarily own the surface rights, thus effecting a taking of their total interest in the land.[71]

This Court has recognized that the ownership of coal rights, separate and apart from the fee simple, is a tangible interest in land,[72] and that if the extraction of the coal is prevented by legislation, the owner's property has been taken without just compensation. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 414 (1922).[73] The challenged

---

[71] That underground mining might be a feasible alternative in some areas of the Nation does not save appellees' Indiana coal rights, which are within the area of surface mineable reserves at depths of less than 150 feet [JA 69-70]. Even the deeper Indiana coal deposits are not economically mineable by the underground method because such deposits are thin, undulatory, erratic and multi-bedded with numerous shale partings. In addition, Indiana has a known fault running along its western boundary that disrupts the coal seams and results in adverse roof conditions [JA 79-80]. That Indiana coal deposits are not economically mineable by the underground method is confirmed by the fact that surface mining accounts for 99% of Indiana's coal production [JA 72, 81].

[72] Indiana law, like that of other states, recognizes the creation of estates in coal, independently of the fee simple. *See, e.g., Short v. Texaco, Inc.,* 406 N.E.2d 625, 627 (Ind. 1980); *Pyramid Coal Corp. v. Pratt,* 229 Ind. 648, 99 N.E.2d 427 (1951).

[73] The Secretary attempts to distinguish *Mahon* by arguing that the statute therein was aimed only at adjusting private legal (con't)

provisions of the Act affect appellees' coal rights and rights to mine so as to constitute a taking of their property rights without just compensation in violation of the Fifth Amendment.[74]

The most subtle, yet pervasive, taking of appellees' property is effectuated by the prime farmland provisions.[75] The taking effect of the foregoing provisions results from the technological impossibility of those requirements. The bottom line is that surface mining will not be allowed on prime farmland unless it can be demonstrated that the land can and will be restored to its prior productivity. Where the productivity is under a high level of management, it is

---

rights, not protecting the public health or safety [Va. Br. 57 n.34]. It is apparent from a review of *Mahon* that the Court's decision was not based on such a distinction. While the Court noted that the case involved a single private house, it went on to state, "No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth." 260 U.S. at 413. In *Penn Central, supra* at 127, this Court duly noted that, "Pennsylvania Coal Co. v. Mahon, . . ., is the leading case for the proposition that a state statute that substantially furthers important *public policies* may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" [Emphasis added.] Accordingly, the Court's decision in *Mahon* is particularly relevant to the case at bar.

[74] Appellee coal companies hold such coal estates in prime farmland to which they do not own the surface rights, and intend to mine such land in the immediate future. [Pl. Ex. 33, 34; R. 961, 963; Tr. 67-68.] They also hold surface coal mining permits for operations on lands that are subject to the Act, most of which contain significant amounts of prime farmland. [Pl. Ex. 7, 8, 31; R. 439, 469, 540; Tr. 67-68.] Therefore, the Secretary's contention that the taking issue is not ripe for adjudication is without merit. Moreover, this Court has recognized facial challenges to regulatory measures concerning the regulation of the use of land. *Agins v. City of Tiburon,* ___ U.S. ___, 65 L.Ed.2d 106, 112 (1980). " 'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.' " *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143 (1974). See also *Andrus v. Allard,* 444 U.S. 51, 62 L.Ed.2d 210, 222 n.21 (1979).

[75] In order to obtain a permit to mine on prime farmland, the operator must demonstrate that he can and will restore the land

(con't)

technologically impossible to achieve that standard or make such a showing.[76] Even if a permit is issued, the bond will not be released until the postmining soil productivity achieves a high level of management yield where that is the prevailing level of management in the surrounding area or was applied to the land prior to mining, which, again, is technologically impossible. As Dr. William McFee, Professor of Agronomy at Purdue University, testified, there are no known studies or experiments conducted by agricultural schools, or any other scientific data, which demonstrate that prime farmland can be restored to its premining level of yield

---

"to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management. . . ." Section 510(d)(1). Pursuant to § 508(a)(2)(C), the reclamation plan submitted as part of a permit application for mining on prime farmland must specify "the productivity of the land prior to mining, including appropriate classification as prime farm lands, . . . obtained under *high levels of management.*" [Emphasis added.] The operator's performance bond will not be released "until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same oil type in the surrounding area under equivalent management practices. . ." [§ 519 (c) (2)].

[76] The Secretary's contention that the Act only requires that prime farmland be reclaimed to levels of yield equivalent to those of surrounding lands is not dispositive because the Act still requires the reclamation of prime farmland to the "equivalent" of a "high level of management" yield where that is the practice in the area or was applied to the permitted land before mining.

Until the May 16, 1980 Round II Decision of the District Court for the District of Columbia [see note 7 *supra*], the Secretary contended that a high level of management yield was the target yield by which success of reclamation had to be determined on all prime farmland, 30 C.F.R. § 785.17(b)(8). This regulation was invalidated by the District Court for the District of Columbia [slip op. at 47], from which ruling the Secretary does not appeal. It remains that where the level of management on the prime farmland prior to mining was a "high level" or where a high level of management is the prevailing practice in the surrounding area, this level of production is still the standard for § 510(d) and § 519(c)(2).

The Secretary grossly exaggerates the effect of the District Court's ruling with respect to § 519(c)(2). The District Court's

(con't)

under high levels of management,[77] and, at best, premining productivity can be achieved only as judged by the "basic level of management" standard [JA 137], which is significantly less than the "high level of management."[78] Another expert, Alten Grandt, who conducted the studies on which the Secretary relies,[79] testified that under the current state of the art, it is technologically impossible to reclaim prime farmland to a premining level of productivity as judged by the high level of management standard [JA 142].

---

ruling was very narrow and invalidated only that portion of § 519(c)(2) that prohibits the release of bond on prime farmland until its premining productivity under equivalent levels of management has been achieved, since this is impossible where the yield required is under a high level of management. [See JS App. 40a-41a.] All the environmental protection standards are still applicable to mining operations conducted on prime farmland, as are voluminous reclamation requirements.

[77] The intent of Congress was that this be shown "by agricultural school studies, or data for comparable areas" [H.R. REP. (CONF. REP.) No. 95-493, 95th Cong., lst Sess. 105 (1977).] Hence, the Secretary's regulations require "available agricultural school studies or other scientific data . . ." [30 C.F.R. § 823.15(c)(7)] to support the operator's showing.

[78] The productivity of corn and soybeans is as much as 30% greater under a "high level of management" than under a "basic level of management" [Dr. McFee, JA 137]. Mr. Alten Grandt, testifying from published data concerning corn yields in Illinois, stated that a high level of management would result in 167 bushels per acre in Muscatine silt loam soil, while a basic level of management would result in only 104 bushels per acre. [JA 140-41.] In southern Illinois soils, the yield results would be 115 bushels per acre and 63 bushels per acre, respectively. [*Id.*]

[79] The Secretary also relies on several articles authored by Mr. Grandt for the proposition that prime farmland can be reclaimed to its premining productivity under high levels of management. [See Ind. Br. 34 n.20; References 3, 5, 7 to Smith's affidavit; R. 803, 813, 826.] But as Mr. Grandt testified, none of his articles stand for the proposition asserted by the Secretary [JA 139]. The Secretary distorts the results attributed to Mr. Grandt. For example, Smith's affidavit states that Mr. Grandt has concluded that corn and soybeans can be grown on reclaimed land and that a "high level of *productivity*" can be achieved. [JA 107.] Significantly, Smith does not swear that premining productivity

(con't)

The Secretary argues for the moment that the term "high level of management" is undefined, that such level of reclamation is not required by the Act,[80] and that, alternatively, it can be achieved. His assertions are notably contrary to the evidence, including the testimony of his own witnesses,[81] the language of the Act and his position in the

---

can be achieved under a "high level of *management*" standard. The Secretary also cites Mr. Grandt's testimony that high levels of productivity are equivalent to levels of productivity obtained under basic levels of management. [Ind. Br. 33 n.19.] But Mr. Grandt testified, "high levels of *productivity*" are *not* as high a yield as productivity obtained under a "high level of *management*." [JA 142.] Mr. Grandt's testimony demonstrates the significance of the difference between the general terms used by the Secretary and his witnesses and the scientific standard required by the Act, "high level of management." Appellees have never argued that crops cannot be grown on reclaimed prime farmland. The evidence clearly establishes, however, that premining productivity cannot be achieved under high level of management.

[80] The Secretary's assertion is also belied by his Memorandum in Support of Federal Defendants' Cross Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Second Round") (hereinafter "Secretary's Brief") at 117 in *In re Permanent Surface Mining Regulation Litigation,* No. 79-1144 (D.D.C. May 16, 1980), where he argued: "Moreover, the concept of 'high level of management,' something above average, is commonly used in the agricultural community as a basis for predicting long-term potential crop yields[4] . . . [which is] the same type of information which agriculturalists regularly use in making annual predictions of expected yield." [Footnote omitted.] In footnote 4 the Secretary identified the source of the definition of the term "high level of management," that being, "U.S. Soil Conservation Service, Soil Survey Manual, U.S. Department of Agriculture, Agriculture Handbook No. 18, 1951, pages 369-370, Administrative Record Accession #178.5, cited in the preamble to the final rules at 44 Fed. Reg. 15285." See also JA 157.

[81] Mr. Smith stated only that prime farmland can be returned to its "pre-mining *productive capability*" [JA 106; emphasis added]. Mr. McCormick stated that "mined prime farmland [can] be restored to its pre-mined *capability,*" [JA 122; emphasis added] and he testified only that premining productivity could be achieved under "*good management practices*" [JA 157; emphasis added]. He admitted, however, that "good level of management

(con't)

regulations litigation. It is clear that the terms "high level of management" and "basic level of management" are accepted scientific terms of art [JA 136-37, 142, 157]. The Federal Government has established a definition for the term "high level of management" which is used in soil survey interpretations that are stored on computers by the Government [see note 77 *supra;* JA 157]; and this definition is the basis of the "high level of management" standard required by the Act [JA 159].

The portion of the Task Force Report relied on by the Secretary merely sets forth "*arguments*" about possible techniques for reclamation of mined prime farmland which *might* result in equivalent levels of yield (and which make no mention of yields under "high" versus any other levels of management) [JA 57-59]. The Secretary ignores the immediately following portion of the Report [JA 59-61], which states that such "arguments" are but "theories and

---

has a wide range in kinds of interpretations, depending upon who you are talking to" [JA 159].

The statements of Imhoff and Wickline establish only that no permits to mine on prime farmland have been denied in Indiana, with the Secretary implying that mine operators have shown that they can reclaim the land to a high level of management yield. But in fact, Wickline confirmed that all Indiana operations were grandfathered pursuant to § 510(d)(2) [JA 153-54], and, therefore, the operators did not have to make such a showing in order to obtain a permit.

Furthermore, Wickline brought with him at trial a document [JA 96-100] showing how the Soil Conservation Service is currently making the determinations that prime farmland can be reclaimed as required by the Act. It shows that the determination is based upon merely whether the operator will mechanically replace the soil horizons as required, see § 515(b)(7), and that no determination of postmining yield is being made. Power's articles [References 4, 6 to Smith's affidavit; R. 811, 820] also do not support the Secretary's position. They merely note the results of experiments that have been conducted, but do not compare such results with the yields obtained before mining. Power qualified his articles by stating that the conclusions presented were tentative pending further experiments (Ref. 4), and acknowledging that there is little or no research to guide agriculturalists in managing reclaimed land (Ref. 6).

proposals," and that "there is no demonstration to date that prime farmland . . ., after having been reclaimed . . ., [will] give equivalent crop performance" [*id.*, at 59]. More significantly, arguments are not facts or "studies or other scientific data," as operators must submit to obtain a permit [see note 77 *supra*].

Thus, none of the matter relied upon by the Secretary supports the proposition that prime farmland can be reclaimed to its premining productivity as judged by the high level of management standard, as required by the Act.[82]

As a result of the technological impossibility of the showing a mine operator must make in order to obtain a permit to mine on prime farmland or the release of a performance bond, appellee coal companies' sole and exclusive interest in coal deposits will be destroyed without just compensation. Even if a particular land use regulation is valid, if the impact of the regulation is such as to destroy the owner's property interest, the owner's property has been taken without just compensation.[83] Therefore, such provisions take appellees' property without just

---

[82] The technological impossibility of the prime farmland reclamation requirements was also noted by the District Court in *Star Coal Co. v. Andrus*, No. 79-171-2 (S.D.Iowa Feb. 13, 1980), slip op. at 15, *appeal pending*, No. 80-49:

> Star Coal contends that this [productivity standards of §§ 510(d) and 519(c)(2)] is a technologically impossible requirement to meet under the current state of the art and has introduced evidence to the effect that once stripped for mining, topsoil structure cannot be returned to its former state for at least 20 years. This evidence suggests that the regulatory agencies may need to give this requirement a liberal construction in interpreting the reclamation standard in the context of the state of the art.

But to ignore the constitutional infirmity due to the impossibility of the requirement on the basis that the regulatory agency may need to be "lenient" in interpreting the requirement, as the Iowa court apparently did, flies in the face of all known constitutional principles.

[83] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 135-36 (1978).

compensation in violation of the Fifth Amendment.

Furthermore, § 522(a), (c) and (d) prohibits, and/or provides for the prohibition of surface mining, or any activity associated with surface mining,[84] where a surface mining use would be incompatible with existing land use plans or programs or might affect fragile or historic lands resulting in damage to "historic, cultural, scientific, and esthetic values. . ." [§ 522(a)(3)(A)-(B)]. Section 522(a)(2) dictates that land *shall* be designated unsuitable for surface coal mining if reclamation as required by the Act is not "technologically and economically feasible." Because of the technological impossibility of the prime farmland reclamation requirements, all prime farmland is subject to such designation. As previously stated, appellee coal companies own the mineral rights to coal which is subject to the foregoing provisions, and if such designation is made, appellees' total property interest will be taken without just compensation.[85]

---

[84] Section 510(b)(4) provides that no permit will be granted to mine on land that has been designated unsuitable for surface mining.

[85] That § 522(a)(6) excepts lands from being zoned unsuitable for surface mining where "substantial legal and financial commitments" were made "prior to January 4, 1977" does not cure the constitutional infirmity because it only recognizes those commitments that were made prior to January 4, 1977 and does not alleviate the situation where land is purchased subsequent to that date and is thereafter zoned unsuitable. Moreover, this Court has recognized that a taking can occur even where the property was acquired subsequent to the legislative encumbrance of its use. *Andrus v. Allard,* 444 U.S. 51, 62 L.Ed.2d 210, 222 n.21 (1979). Thus, an exception to the Act's applicability to certain lands does not change the constitutional issue.

Furthermore, the definition of "substantial legal and financial commitments" includes much more than merely the value of the land itself. *See* 30 C.F.R. § 762.5. That term has been interpreted by the Secretary to require not only that the land be owned, but also that it be part of an ongoing mining operation and that a significant investment have been made on the basis of a long-term coal contract in power plants, railroads, coal mining and handling equipment and the like. The definition expressly states

(con't)

Similarly, § 522(e)(4) and (5) zones the area within 100 feet of a cemetary or the outside right-of-way of any public road, and within 300 feet of any occupied dwelling, public building, school, church, community or institutional building or public park as off limits to "surface coal mining operations." This effectively prohibits[86] any and all beneficial uses of appellees' property. Accordingly, § 522(e)(4) and (5) effects a taking of appellees' property without just compensation in violation of the Fifth Amendment[87] and the District Court's ruling concerning § 522 was proper in all respects.[88]

The Secretary's legal analysis [Va. Br. 51-58] is irrelevant

that, "Costs of acquiring the coal in place or of the right to mine it without an existing mine,. . ., alone are not sufficient to constitute substantial legal and financial commitments." 30 C.F.R. § 762.5. Therefore, a landowner can still be deprived of his entire property interest without just compensation.

[86] See pp. 13-14, 47 n.66 *supra.*

[87] The Secretary's contention that the validity of § 522(e)(4) and (5) is saved by the fact that § 522(e) does not apply to "valid existing rights" is without merit. The term "valid existing rights" means substantially more than the legal ownership of the property affected. Pursuant to 30 C.F.R. § 761.5, not only must the mine operator own the land, but he must also have had a permit to mine it on or before August 3, 1977, or must demonstrate "that the coal is both needed for, and immediately adjacent to, an on-going surface coal mining operation for which all permits were obtained prior to August 3, 1977." In addition, the "valid existing rights" exception does not apply to land or permits acquired after August 3, 1977. See note 85 *supra.* Furthermore, the waiver authorized by § 522(e)(5) is applicable only to occupied dwellings, and not to the buffer zones established around other structures or property. The waiver provision is also an unconstitutional delegation of power to private parties, contrary to the Fifth Amendment. See Liebmann, *Delegation to Private Parties in American Constitutional Law,* 50 IND. J. L. 650, 675-80 (1975). Thus, § 522(e)(4) and (5) totally prohibits the mining of coal owned by appellees, as well as all other uses of the land associated with surface mining, without just compensation.

[88] The decision of the District Court concerning the invalidity of § 522 is consistent with that of the Court in *Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus,* 483 F. Supp. 425 (W.D.Va.), *prob. juris. noted,* Nos. 79-1538 and 79-1596 (1980).

to the taking effect of the provisions in question in the case at bar. First, no variances are allowed from those provisions as there are for the steep slope or mountaintop AOC requirement. Second, the Secretary's arguments concerning the character of the governmental intrusion and the relevant factors involved in determining whether a taking has occurred do not apply to a situation where, as here, appellees' property rights, i.e., their coal deposits, will be completely and totally destroyed.[89]

The Secretary's argument that this Court's decisions "suggest" that a governmental body may prohibit noxious uses of property, and, therefore, the provisions of the Act in question do not effect a taking, is totally misdirected [Ind. Br. 31; Va. Br. 55-58]. The precedents relied on by the Secretary all involve the *States'* regulation of the use of land pursuant to their inherent police power. Unlike the States, however, Congress has no power to legislate for the general welfare, except with respect to its taxing and spending powers, and, specifically, has no general police power.[90] Accordingly, the Act cannot be sustained on the basis that it is an exercise of some nonexistent Federal police power.

Furthermore, the cases which establish that the States can prohibit the noxious use of property, even though not applicable to land use control measures enacted by Congress, do not go as far as the Secretary would have the Court go here. Those cases do not hold that a noxious use can be prohibited without just compensation where there is

---

[89] There can be no balancing of public and private interests where the landowner is left with absolutely no beneficial use of his property interest whatsoever. *See Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 138 n.36 (1978). Accordingly, the diminution in value and lack of alternative uses of appellees' property is quite relevant (in fact, dispositive) where, as here, there is no beneficial use of the property remaining.

[90] *Kesler v. Department of Public Safety,* 369 U.S. 153 (1962); *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936); *United States v. Butler,* 297 U.S. 1, 64-67 (1936); *Kansas v. Colorado,* 206 U.S. 46, 89-90 (1907).

absolutely no use left to the property owner at all, which is the precise effect of the provisions in question in the instant case.[91] Therefore, even if the Federal Government had a police power like that of the States, which it does not, the Constitution does not condone the measures in question where the effect is that the landowners' total property interests will be extinguished.

The lack of merit of the Secretary's argument that appellees should seek compensation under the Tucker Act before challenging the constitutionality of the Act is apparent on its face. The Secretary admits that such action may not even lie. In addition, the instant action is one for declaratory judgment, not for the recovery of damages. That is, appellees challenge Congress' power to take their property under the provisions in question, and are not merely seeking compensation for the property that has been so taken. The Court of Claims has no jurisdiction to adjudicate such a claim. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 102 (1978); *United States v. Testan*, 424 U.S. 392, 397-98 (1976).

VI. SECTION 518(c) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The District Court's ruling on the procedural due process issue is consistent with the decisions of this Court. While appellants contend that the District Court misunderstood

---

[91] Indeed, that alternative uses remained is the reason that this Court upheld the State prohibition of the use of property for manufacturing liquor in *Mugler v. Kansas*, 123 U.S. 623 (1887). The Court specifically noted therein that "Such legislation does not disturb the owner in the control or use of his property for lawful purposes,. . . ." 123 U.S. at 669. That the availability of feasible alternative uses is essential to sustaining a State land use control measure was reaffirmed by this Court as recently as 1978 in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), where it was acknowledged that "the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." [438 U.S. at 131.]

the procedure established by § 518(c), it is apparent from its ruling that it did not.[92]

It is firmly established that the Fifth Amendment forbids the taking of property without due process of law. An essential element of due process is that a person be afforded a meaningful hearing before his property is taken.[93] *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970). Only in extraordinary circumstances, where a valid and overriding governmental interest is at stake, can the hearing constitutionally be postponed until after the deprivation has occurred. *Boddie v. Connecticut,* 401 U.S. 371, 378-379 (1971).

The effect of § 518(c) is that a mine operator charged with a violation is forced to purchase his due process rights. Once the Secretary determines, to his own satisfaction, the amount in which the penalty should be assessed, the mine operator has no choice but to prepay that amount to the

---

[92] The District Court specifically noted that "[t]he administrative procedure providing for an informal conference before the assessment of the proposed penalty. . . is insufficient to cure the constitutional infirmity of § 518(c)." [JS App. 44a.] To be meaningful, the hearing provided must be before a neutral party. To argue that a person charged with a violation is afforded due process by having an informal conference with the same person or agency that is charging him with a violation flies in the face of this firmly established principle.

[93] The cases relied upon by the Secretary and *amici* for the proposition that a hearing is not required before a person's property can be taken or that a hearing at any time constitutionally suffices are inapposite to the case at bar. Those cases, *e.g., Matthews v. Eldridge,* 424 U.S. 319 (1976); *Arnett v. Kennedy,* 416 U.S. 134 (1974), all involved the termination of governmental benefits or services, not the deprivation of an individual's exclusive property rights. There is no decision of this Court that holds that it is constitutionally permissible to require prepayment of a proposed penalty before a full evidentiary hearing as to the merits of a violation of the law. Even in pre-termination situations such as welfare benefits, an evidentiary hearing is required prior to the termination of such benefits. *Goldberg v. Kelly,* 397 U.S. 254 (1970).

Secretary in order to preserve his constitutional right to contest the fact of the violation or the amount of the proposed penalty.

Even a balancing of governmental and private interests [*e.g., Matthews v. Eldridge,* 424 U.S. 319 (1976)] cannot sustain the prepayment requirement of § 518(c). The only asserted governmental interest at stake is administrative convenience in the prompt collection of penalties. Administrative convenience clearly does not outweigh the deprivation of potentially thousands of dollars as the result of an alleged violation.[94] Therefore, the District Court correctly ruled that the prepayment requirement of § 518(c) violates the Fifth Amendment.[95]

CONCLUSION

The Surface Mining Act presents several constitutional issues in contexts not previously before this Court, the most important of which go to the fundamental structure of Federalism implicit in the Constitution that guarantees a meaningful, separate and independent existence for the States. If the Commerce Clause evolves to devour State land use planning and control, "experience" would dictate that the States would be relegated to being but "puppets of a

---

[94] This conclusion is particularly compelled in light of *Goldberg v. Kelly,* 397 U.S. 254 (1970), where it was held that even conserving the public treasury did not outweigh a recipient's right to welfare benefits.

Furthermore, there are less intrusive alternative methods to compel the payment of final penalties. For example, Congress could have authorized the Secretary to suspend the permits of an operator who does not promptly pay the penalty, or could have authorized the recovery of litigation expenses to recover penalties.

[95] The validity of § 518(c) is not preserved by the fact that the prepaid penalty will be refunded with interest if an operator's challenge is successful. The Fifth Amendment prohibits even the temporary deprivation of property without a hearing. *Fuentes v. Shevin,* 407 U.S. 67, 85 (1972). See Motion to Affirm 28 n.36.

ventriloquist Congress" with the destruction of that fundamental structure being a *fait accompli.* Either the evolution of the Commerce Clause must take a different path, or the Tenth Amendment must evolve to pose detours,[96] so that the States will have the meaningful, independent and separate existence required by our Constitution. In either event, the challenged provisions must fall.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General
LINLEY E. PEARSON
Attorney General-Elect
JACK R. O'NEILL
Deputy Attorney General
For State of Indiana, Otis R. Bowen, M.D., Governor, Indiana Department of Natural Resources, and Joseph D. Cloud, Director.

HARRY T. ICE
G. DANIEL KELLEY, JR. *
BYRON L. MYERS
STEPHEN M. TERRELL
For Indiana Coal Association Meadowlark Farms, Inc., AMAX Coal Company, a Division of AMAX Inc., Peabody Coal Company, and John A. Conlon.

**Counsel of Record*

---

[96] See *amicus curiae* briefs filed by Mountain States Legal Foundation, at 3-11, National Coal Association and American Mining Congress, at 7-18, and National League of Cities, *et al.*

APPENDICES

APPENDICES

APPENDIX A

The prime farmland provisions are:

Section 507(b)(16) [30 U.S.C. § 1257(b)(16)] requires the applicant to identify in the permit application the location of "prime farmlands" on which surface mining operations are to be conducted, pursuant to the definition of prime farmland as established by the Secretary of Agriculture pursuant to § 701(20) [30 U.S.C. § 1291(20)].

Section 508(a)(2)(C) [30 U.S.C. § 1258(a)(2)(C)] requires that the reclamation plan submitted with the application include a statement concerning "the productivity of land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, [or] fiber . . . from [prime farmland] under high levels of management . . . ."

Section 510(d)(1) [30 U.S.C. § 1260(d)(1)] requires that the regulatory authority, before issuing a permit for surface mining operations on prime farmland, shall consult with the Secretary of Agriculture, and grant a permit to mine on prime farmland only if the regulatory authority finds that the operator "has the technological capability to restore such mined area . . . to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards in Section 515(b)(7) . . . ."

Section 515(b)(7) [30 U.S.C. § 1265(b)(7)] requires the separate removal and replacement of the A, B and C soil horizons in the instance of prime farmlands.

Section 515(b)(20) [30 U.S.C. § 1265(b)(20)] as to that portion which provides, "when the regulatory authority approves a long-term, intensive, agricultural postmining land use," and further that portion "when the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the

mining and reclamation plan . . ." and any other part which requires any postmining land use.

Section 519(c)(2) [30 U.S.C. § 1269(c)(2)] which provides that the bond for mining on prime farmland may not be released "until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices . . . ."

APPENDIX B

The provisions requiring approval of changes in the postmining land use are: § 507(d) [30 U.S.C. § 1257(d)] which requires the submission of an acceptable reclamation plan, which must contain information regarding the premining and postmining use, as well as the productivity of land, and those which require a detailing in the plan of how the proposed postmining land use will be achieved, as well as necessary support activities for the proposed postmining land use, all as contained in § 508(a)(2), (3), (4), (8) and (10) [30 U.S.C. § 1258(a)(2), (3), (4), (8) and (10)]; § 510(b)(1) and (2) [30 U.S.C. § 1260(b)(1) and (2)] which require that a permit application be denied unless all of the application requirements are accurate and complete and that the reclamation requirements including the land use concepts as set forth above, "can be accomplished;" and certain portions of § 515(b)(19) and (20) [30 U.S.C. § 1265 (b)(19) and (20)] which are respectively the "approved postmining land use plan," and "the regulatory authority approves a long-term intensive agricultural postmining land use," and "the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan . . . ."

APPENDIX C

The Indiana Act, which provides the parroting of the Federal Act so that Indiana can have a State Program, provides in IND. CODE § 13-4.1-1-1 (Supp. 1980) as follows:

Legislative findings. The general assembly finds that:
(1) P.L. 95-87, the federal Surface Mining Control and Reclamation Act of 1977 [30 U.S.C. §§ 1201-1328], provides that the federal government will assume control of the regulation of surface coal mining operations and reclamation procedures within Indiana unless the state of Indiana enacts laws as specified by the federal act.

(2) The *federal act in many parts constitutes an intrusion* into *land use planning and control, an integral and traditional aspect of the sovereignty of the state of Indiana,* its people, and political subdivisions, as well as numerous other state and local governmental functions as reserved to them by the Tenth Amendment of the Constitution of the United States.

(3) Since 1941, the state of Indiana has enacted legislation governing the methods of strip mining and reclaiming coal bearing land within Indiana and the enforcement of these state laws has resulted in an environmentally well managed coal industry in the state of Indiana that is required to reclaim strip mined land and to return that land to its highest and best use prior to release of a statutorily required bond sufficient to cover the costs of reclaiming any land left unreclaimed by a mine operator.

(4) *The threat that the federal government will regulate the surface coal mining operations and reclamation* procedures, *including land use planning and control,* if the state of Indiana does not enact the necessary legislation for a state program, *is coercive. It makes the overriding consideration whether to prevent further federal encroachment upon and regulation and control of the state, its people, and local*

industry, rather than what is in the best interest of the people of the state of Indiana, considering local employment opportunities, financing of local government, and the use of local and state natural resources with consideration for the geography and terrain of the area.

(5) The state of Indiana has challenged the federal act in a lawsuit presently pending before the United States District Court for the Southern District of Indiana, Indianapolis Division, entitled STATE OF INDIANA: OTIS R. BOWEN, M.D., Governor of the State of Indiana; JOSEPH D. CLOUD, Director of the Indiana Department of Natural Resources; and INDIANA DEPARTMENT OF NATURAL RESOURCES; Plaintiffs, vs. THE UNITED STATES OF AMERICA; CECIL D. ANDRUS, as Secretary of the United States Department of Interior; WALTER J. HEINE, as Director of the Office of Surface Mining Reclamation and Enforcement; OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT; UNITED STATES DEPARTMENT OF INTERIOR, Defendants [IND. CODE § 13-4.1-1-1 (Supp. 1980), as added by Acts 1980, P.L. 101, § 3.] [Emphasis added.]

Indiana beginning in 1941 extensively regulated reclamation of surface coal mining activities, *see* IND. CODE § 14-4-2-1 *et seq.*, and in 1967 began even more extensive regulation, *see* IND. CODE § 13-4-6-1 *et seq.* In fact by the 1960's, surface coal mining was not contributing at all to water pollution. *See Section 208 Water Quality Management Planning For Region Seven,* which is a study that determined "[t]he only mine drainage problems documented were caused by coal mines abandoned prior to 1967 Indiana Surface Mine Act (IC § 13-4-6 *et seq.*)." [JA 102.]